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THE LAW MAGAZINE AND REVIEW.

No. CCCXXVI.—NOVEMBER, 1902.

I.—THE REPORT OF THE COMMISSIONERS OF PRISONS, 1901-2.

THE Report which lies before us forms a bulky volume of 643 pages, a considerable portion of which strikes us as neither interesting nor important. The Commissioners' own part of the volume is much the best. Many of the extracts from the reports of governors, chaplains, etc., might well have been spared, and they sometimes enter into the details of alterations and repairs with a minuteness that is almost ridiculous. A large book containing a quantity of unimportant matter, is inconvenient for those who desire to study the subject, and has a deterrent effect on the general public.

The Prisons Commissioners appear to be painstaking, thoughtful, and humane men, who are not deterred by precedent and routine from endeavouring to promote the public good to the best of their ability. Unfortunately, under our present system, the fate of prisoners is chiefly dependent, not on the Commissioners, but on the permanent officials of the Criminal Department of the Home Office, who do not possess the same practical knowledge of prisoners and prisons, and do not, we fear, always entertain equally enlightened views. If in the following remarks we sometimes criticise the Commissioners, it is not that we

are insensible to their merits, but that we believe more practical good will be effected by calling attention to their defects. They aim at amendment, not, like some other officials, merely at preserving the present routine intact, and they will probably welcome suggestions on this subject which the Home Office officials might only resent.

The Prisons Commissioners have to face a general increase of crime in their present report—a somewhat disheartening result for those who have been labouring for some time to amend our present system. We give their explanation of this fact, and proceed to comment on it.

“There were, including court-martial prisoners, 193 more prisoners sentenced to penal servitude and 17,163 more to imprisonment than in the previous year. The daily average of prisoners detained in local prisons was 16,267,¹ or the highest since the year 1885. We have endeavoured by local inquiry, in which we have been kindly assisted by the police authorities at places where the increase has been most marked, to ascertain whether local causes existed which would account for the growth of the prison population. It is, however, impossible to assign any specific cause, as the increase has been generally distributed throughout the country, and it is our opinion, with which we have acquainted the Secretary of State, that it would be sanguine to anticipate, having regard to many circumstances, *e. g.*, the growth of large industrial centres, involving in many cases an extension of borough limits, and thus a greater activity and efficiency of police, a multiplication of statutes and bye-laws involving penal consequences, and an increase of the population pressing against the means of subsistence, that the average numbers will again fall to the level of the last decade. Prison statistics go to show that, while serious or indictable crime will continue to show a decrease both absolutely and relatively to population, petty crime will

¹ The number had, however, fallen to 15,817 at the end of the year.

show a decrease only relatively to population, or, in other words, that with the increase of population there will be a corresponding increase of persons committed to prison on summary convictions."

This seems to us to be hardly self-consistent, while it is in reality no explanation at all. In the first place, the increase with which the Commissioners had to deal was not limited to petty offenders, for there was a material increase in the number of persons sentenced to penal servitude. In the next place, the increase of 17,000 in the committals to local prisons is larger than the increase of population will account for. In the third place, the creation of great industrial centres, accompanied by enlargement of municipal boundaries, etc., is almost confined to certain parts of the country, while the increase of crime is described as general; nor has this growth of industrial centres and extension of boundaries proceeded more rapidly than usual during the period of increase. Then we come to the debatable ground of the Malthusian theory of population. That this theory is not true without qualification is sufficiently evident. The means of subsistence appear to have increased more rapidly than the population during the last century. We see no reason why they should not continue to do so for another half-century at least. But assuming that the pressure of population on the means of subsistence is becoming greater and will continue to do so, the effect thereby produced on criminal statistics will be of a mixed character. It has been noticed that the crime of "drunk and disorderly," which contributes so largely to the gross figures in our criminal statistics, is most prevalent when the country is most prosperous. The more money the working-men receive the more they spend in drink. Very frequently, however, the penalty for this offence consists of a fine, with the alternative of imprisonment. When the times are bad, a larger proportion of those

thus sentenced will be unable to pay the fines; and thus the prison population might be kept up, notwithstanding a diminution in this class of offences. Where the effect of hard times would really appear is in crimes of dishonesty. Want is a temptation to dishonesty, and home discomforts render the change to prison life less deterrent. Well-fed people, on the other hand, would probably be more likely to commit crimes of violence. We can hardly expect to derive useful general results from unanalysed and unclassified statistics. The Prisons Commissioners, at all events, do not appear to have had much success in this respect.

One cause for increased crime, however, has been so often mentioned in treatises published long before the present juncture (for example, in *Pike's History of Crime*), that we are surprised to find that the Commissioners have not even alluded to it. We mean war. That war should conduce to crime—at all events, to certain kinds of crime—might have been expected *a priori* without referring to the experience of former wars. In spite of all that has been done to humanise warfare, those who are engaged in it can hardly entertain as much respect for life and property as they previously did, while acts of violence not resulting in death or serious injury are often unpunished. The soldiers express their sentiments in letters to their friends at home, which are often published in the newspapers. War correspondents express similar sentiments; so do the leading articles in the press. If the enemy exceeds the limits of legitimate warfare, there is a cry for vengeance. Even a defeat leads to a similar cry. The “war spirit” is aroused everywhere. It exhibits itself on the one hand in an outburst of crimes of violence—on the other in a demand that these crimes should be repressed by violent methods. Humanitarianism is ridiculed, and the indulgence of revenge or of “righteous indignation” is represented as the proper object of all criminal legislation. The man who advocates lenient treatment

for prisoners is regarded as a sympathiser with crime, and almost a criminal himself. The man who has a word to say in favour of the enemy is disloyal. A development of brutality will always accompany this war spirit. Nor will this outbreak cease as soon as the war is over. On previous occasions, it was most strongly felt immediately after the peace. Soldiers imbued with these sentiments came home and were disbanded, and thus relieved from the discipline which had hitherto operated as a restraining force. Something of the same kind may be expected on the present occasion, but if we become involved in no further wars the future appears to us more hopeful than the Commissioners regard it. Humanity is not only the best, but the most natural policy in times of peace.

It is, perhaps, fortunate for the humanitarians that the Home Office has throughout the war turned a deaf ear to their representations, whether general or special. The prerogative of mercy has never been used more sparingly, and nobody can attribute the general increase of crime, on which the Commissioners comment, to the more lenient action of the Home Office with regard to prisoners. The war spirit is opposed to any remission, and for some time past its influence has dominated the Home Office. We do not say that the increase of crime has resulted from the harshness of the Home Office in this respect, but certainly that harshness has utterly failed to check the increase of crime. An exercise of the prerogative of mercy on the doubly-auspicious occasion of the Coronation and the King's recovery could scarcely have done harm, and might have done good; and we feel confident that it was not by the desire of His Majesty that it was withheld. Perhaps we may still have it on Thanksgiving Day.

With regard to one of the causes of the increase in the "prison population" mentioned in the report—the increased activity of the police—it may be remarked that if this

activity is directed towards bringing real criminals to justice, the temporary increase of the prison population should be succeeded by a permanent diminution; for anything that increases the chances of conviction will help to deter persons from committing crimes in future. But it may consist in bringing charges against persons guilty of some technical offence, but who were not really doing any harm. If it be true that in certain localities a constable gets a bad mark unless he arrests a given number of persons in a given time, an apparent increase in the number of petty offences in these localities needs no explanation. The constable must supply his tale of bricks, and if no straw comes to hand he goes in search of stubble; or, to adopt another Scriptural simile, he goes out into the highways and byeways and compels the people to come in, that our prison-houses may be full. But magistrates should learn not to send people to prison on these trumpery charges.

We may notice, too, that imprisoned debtors contributed to increase the prison population during the period covered by the Report. We learn that 14,039 persons were imprisoned during the year "as debtors or on civil process," as against 12,576 in the preceding year, thus showing an increase of 1,463, or between 11 and 12 per cent. in one year. This number is exclusive of those sent to prison "in default of sureties." The figures are worthy of attention. We were assured that imprisoned debtors could always pay if they chose to do so, but preferred imprisonment on the old easy terms to producing the cash. So the terms of imprisonment were rendered more stringent by the Act of 1898, and it was predicted that imprisonment for debt would practically cease, and that the creditors would receive their money. The result after three years' trial is 14,000 imprisonments, being an increase of over 1,400 on the year. If the Report had given us the amounts due to the 14,000 creditors, and the expense which the country was put to by the proceedings

against the 14,000 debtors, it might have proved interesting reading.

One of the great objects of the Prisons Act of 1898 was to effect a classification among prisoners—an object of which the Commissioners express their strong approval. But they tell us that in this respect the Act has proved almost a dead letter, because, as has happened with many other reformatory measures, the magistrates make no use of it. “There is but a slight difference,” they write, “in the actual treatment of prisoners sentenced to the Second or Third Division, but the sentence to the Second Division implies at least the segregation of the prisoners, and marks the distinction between the really criminal and only quasi-criminal acts, which we believe it was the intention of Parliament to emphasise, when it conferred this classifying power on the Courts of law.” They then refer to the fact that no less than 49,000 persons were sent to prison without hard labour for non-payment of a fine during the year, yet very few of these were placed in the Second Division. The exact number is not stated; but in a kind of prison census, taken in the various prisons on the same day, it appeared that of 24 persons imprisoned for offences against the Elementary Education Act, only 4 were in the Second Division; of 100 convicted under Local Acts and Bye-laws only 2; and of 44 convicted of obstructions or nuisances none at all. In fact, only 3·7 per cent. of the prisoners who, not having been sentenced to hard labour, might have been placed in the Second Division, were placed in it, against 5 per cent. in the preceding year. The number in the First Division is not stated, but was no doubt very small, so that upwards of 95 per cent. of those who were classified were placed in the Third Division. It may be noted, however, that the Governors of Prisons do not seem to be dissatisfied with this state of things. Thus the Birmingham Governor writes: “The triple division of

offenders *continues to work satisfactorily*. One female prisoner has been received in Division I, and only six males and one female in Division II." This reminds one of the surgeon's remark to his pupils: "Gentlemen, the operation is successful, but the patient is dead." The Home Secretary, it seems, called the attention of the magistrates by circular to their powers in this matter, with the result that the proportion placed in Division II was even less than before. But has not the Home Secretary the power of modifying these sentences himself, and directing that a prisoner who has been sentenced to imprisonment in Division III shall be placed in Division II? If so, and if—as his own circular as well as the Report before us implies—he finds that the magistrates are not carrying out the plain intentions of the framers of the statute, why does he not intervene and make the requisite correction? Of what use is an appellate tribunal which issues circulars to the Courts of First Instance, and when those Courts utterly ignore them, stands by with folded arms and allows "the law to take its course"? It is useless to advise the Court below not to go wrong, and then to add, "But we will not reverse you if you do." Possibly the Home Office may be able to offer a defence of its action both in this and in other matters in which its proceedings have been impugned. But why is not that defence laid before the public in an Annual Report similar to that of the Prisons Commissioners, giving details of the claims for clemency brought before the Department and the mode in which each was dealt with, together with the reasons, or at all events the principles, on which each decision proceeded? That this tribunal really dispenses justice, not mercy, is sufficiently evident from the fact, that when mercy is refused the ground assigned is almost always in substance that it would be inconsistent with justice to grant it. There must, therefore, be grounds of justice for every refusal of mercy;

and such grounds are always capable of being stated. Nor is there any reason why the reports of police and others on which the Home Office acts should not be cited as freely as those of prison governors, doctors, and chaplains, in the volume before us.

But while the efforts of the Commissioners, as regards the classification of prisoners, have hitherto been frustrated, they have taken a very important step as regards prisoners between the ages of 16 and 21 years for whom special treatment is now for the first time provided. The rules and details of this treatment are given in the Report before us. "Their object," write the Commissioners, "broadly stated, may be said to build up self-respect." This seems to us to be the true principle to apply to such cases, and if kept steadily in view any defects in the original plan will soon be detected and rectified. A proposal for extending the age for birching is not likely to meet with much favour from persons imbued with this principle, nor indeed is the free use of the birch up to the age of 16 very conducive to the cultivation of self-respect as soon as that age has been reached. Nor is this the only improvement which has been introduced. The abolition of the tread-mill will be regretted by none save those who think that anything that has lasted for a considerable time must be good. The new prison dietary, whether susceptible of improvement or not, is clearly better than the old. The power of earning a remission of a part of the sentence by industry and good conduct has already proved a powerful incentive to both. Why should it not be granted to the unfortunate "lifer" as well as to the person who is committed for a term of months or years?

The treatment of untried prisoners has also been rendered more humane, but in this respect there is still much to be desired. A prisoner who is presumed to be innocent, and is only detained for safe custody—perhaps because from

poverty unable to procure bail—ought, as far as possible, to have all the same facilities for communicating with the outer world, both by letter and by interview, that he would have if liberated on bail. Otherwise, there will often be one law for the rich and another for the poor. The present restrictions are calculated to hamper the prisoner materially in making his defence. Eaves-droppers at interviews, and letters opened, read, and perhaps detained, in order to be given in evidence against the prisoner at trial, are little short of an outrage. What would be said if similar conditions were sought to be imposed on an accused person who had been bailed out? It is also worthy of notice that prisoners for debt in the metropolis are to be sent to Wormwood Scrubbs, a prison for male convicted prisoners, instead of to Brixton, where untried prisoners are to be kept; and the rule for having separate prisons for prisoners of different sexes will apparently be departed from in the case of female debtors.

Professional criminals—in substance professional thieves—also engage the attention of the Commissioners, and it seems that they have recommended to the Home Secretary a mode of dealing with them, the nature of which is briefly indicated and resembles the indeterminate sentences passed in some of the United States, and indeed the life-sentences passed by the Home Secretary when commuting sentences of death—many of these “lifers” having been liberated in a few years. Sentences of penal servitude, it is suggested, might, as recommended by a former Home Secretary, be passed for the maximum term which the present law permits, but carried out under somewhat relaxed conditions, the Home Secretary being empowered to grant a conditional liberation when it was reported that there were good hopes that the prisoner had reformed. To this project there are several objections—the most obvious being that, as the prisoner has no opportunity of stealing while in gaol,

there is no way of forming a well-grounded opinion as to whether he is anxious to turn over a new leaf or not. An accomplished hypocrite would, in fact, have the best chance of liberation. Much, however, would depend on the prison officials who would, in effect, exercise the discretion at present vested in the trial judges. A sanguine and benevolent governor would regard almost every prisoner as a reformed character and recommend liberation accordingly, while one of a gloomy and misanthropic disposition would refuse to entrust any of them with the privilege of freedom. Inequalities would certainly arise, and there would be charges of favouritism and jobbery which would shake the public confidence. It should be observed that these professional thieves seldom resort to violence, nor do they often succeed in making a large haul.¹ They spend a large portion of their time in prison as it is, and cost us almost as much while there as when at large; and even if permanently placed under lock and key, recruits would ere long be found to take their places. The importance of protecting the public against individual depredators has, we think, been exaggerated. It would be very desirable to bring the perpetrator of every individual crime to justice, but we might pursue this end in so objectionable and expensive a manner as to render the remedy worse than the disease. The same remark may, we think, be applied to individual criminals. We have not much faith in reformatories for adults; but even if the professional thief is anxious to lead an honest life when discharged from prison, how can he do so unless placed in a position to support himself by honest labour? No kind of discharged prisoners would find it more difficult to obtain employment than those released

¹ Sir Robert Anderson seems to maintain the contrary; but the fact is, that when a man has once been tried and convicted, he has very little chance of perpetrating extensive frauds. A clever swindler may have succeeded in several large frauds before being convicted, but we cannot treat unconvicted swindlers as professional thieves.

from a reformatory for professional thieves, and the difficulty would be enhanced by police supervision if resorted to. More of the relapses into crime which occur under the present system are due to this inability to earn an honest living than the public is probably aware of; and there is little use in trying to reform a thief, if, at the end of the process, he has to choose between dishonesty and starvation. There is more to be said for indeterminate sentences at the *beginning of a career of crime, than after a man has fully embarked in it.* Only a small measure of success can be expected from any new mode of dealing with professional thieves, and after making extensive changes in their treatment we might not improbably find that the game was not worth the candle. Improvements in the present system are no doubt possible, and ought to be adopted, but the matter is neither very urgent nor very important. It is satisfactory, however, to find that the Prisons Commissioners do not recommend a vindictive punishment followed by an additional penalty imposed for the protection of the public.

We learn from the Report that the main distinction between imprisonment with and without hard labour is, that in the former case the first 28 days are spent at more or less disagreeable work, "in strict cellular separation." The connection between hard labour and cellular separation is not very obvious, and we suspect the person who passes sentence is often unaware of it. The Commissioners appear to prefer associated labour, controlled by classification. We have never been satisfied as to the merits of strict cellular separation; but if the object be to cut off evil communications, surely its adoption for 28 days, or any other limited period, will not prevent these communications during the remainder of the term of imprisonment. Moreover, it is chiefly the better class of prisoners who require to be protected against evil communications, while those who are sentenced to hard labour belong to the worst class.

There is still abundance of scope for the exercise of common sense as well as humanity in the management of our prisons. A sentence of penal servitude, we believe, commences in the same way as a sentence of hard labour.

Punishments seem, on the whole, to be pretty frequent, and though there is less flogging¹ than there was some years ago, that punishment is by no means obsolete. We refer to it chiefly, however, on account of the very unsatisfactory account given of the reasons for its infliction, which are tabulated in an Appendix to the Report. During the year 46 prisoners were flogged for breaches of discipline. In all cases but two the offence is set down as "Gross personal violence to an officer," or "to officers" of the prison. Now, "gross personal violence" may mean anything, from a trivial assault to an attempt to murder, and we can see no reason why in a report which professes to give the details of each case the public should be put off with this miserable modicum of information. (In the remaining two cases the offences were "mutiny" and "inciting to mutiny.") However, we are given another little slice of information in the next column, which is the same in all the 46 instances, viz., "The offence was of so serious a character as to render the infliction of corporal punishment *necessary* for the due preservation of discipline." Here, again, we think the public might receive some intimation as to the circumstances which rendered the infliction of corporal punishment necessary. And strange to say, in two instances (for there are 48, not 46, in the table), the punishment which the Report declares to have been "*necessary* for the due preservation of discipline," was not confirmed by the Home Secretary,

¹ We refer to flogging for prison offences. One of the defects of the Report is the absence of information as to sentences of flogging passed by Courts of Justice on prisoners convicted of crimes. Appendix No. 3 ought to have contained a statement on this subject and is imperfect without it. But we believe that a much larger number of floggings are due to the Visiting Justices than to the Judges of the High Court.

and discipline, we presume, was not preserved in consequence.¹ One of these cases occurred at Maidstone, where two sentences of flogging were passed by the Visiting Justices, the second of which the Home Secretary reduced from 36 lashes to 12. The other case in which the sentence was not confirmed occurred at Preston, where there were three flogging sentences, one of which was also reduced from 36 lashes to 12. Preston and Maidstone were the only places in which sentences of 36 lashes of the cat were passed.² The Home Secretary reduced the 108 lashes to 24, but we presume the same Visiting Justices still preside over these prisons. Of the sentences passed elsewhere only two were reduced by the Home Secretary, while in a third instance the doctor stopped a flogging of 30 strokes when the culprit had received 20. The largest amount of flogging took place at Portland and Dartmoor, there being 11 inflictions at the former and 9 at the latter; but as there are nearly 1,000 convicts at Dartmoor, against 700 at Portland, the proportion for the latter is greater than that for the former by more than one-half. At Dartmoor the cat only was used, while at Portland there were six inflictions of the cat and five of the birch. The ages of the offenders are not given. At several large prisons, no flogging was found to be necessary for the maintenance of discipline. The punishment which was found to be necessary at Preston was not needed at Manchester.

Having touched on the inequality with which flogging is dealt out to offenders in different prisons, we may remark that the inequality as regards some other punishments is still greater—a punishment largely resorted to in some prisons being wholly disused in others. For example, the

¹ However, the Governor of Maidstone Prison reports that “the discipline of the prison has been good,” and the Governor of Preston Prison that “the conduct of the prisoners has generally been satisfactory.”

² In Birmingham, where similar sentences were lately passed and carried out, no prisoner received more than 12 lashes in 1901-2.

total number of female prisoners punished by being put in irons or handcuffs was 40, of whom 12 were at Durham, 10 at Wormwood Scrubbs, and 6 at Maidstone; all the remaining local prisons collectively giving the same number as Durham alone. In Holloway Prison the punishment was not adopted in the case of any female, though the number committed was more than twice as large as in Durham, Wormwood Scrubbs, and Maidstone put together. Holloway, again, presents no instance of confining females in special cells for refractory prisoners, while Wormwood Scrubbs is responsible for 13 out of a total of 41. At Holloway, out of over 25,000 prisoners, male and female, who spent a portion of the year in prison, only 631 incurred any form of punishment, while at Wormwood Scrubbs 949 were punished out of less than one-fourth of the number. Taking two adjacent counties, at Gloucester 67 males were punished out of 1,070, while at Hereford 68 were punished out of 308. Idleness appears to have been the great offence at Hereford, but it evidently did not extend to Gloucester. As regards idleness, however, so far as the male prisoners are concerned, Liverpool is a very easy 'first, with 1,944 offences of this class to a total of 9,921 prisoners. On the other hand, only two such offences are recorded against 8,272 female prisoners at the same place. What idle men! What industrious women! But there is evidently as much inequality in the treatment of prisoners as in their sentences.

The imprisonment of children, though diminishing, has not ceased. We seem to have imprisoned criminals of the mature age of nine years, and during the last year 19 persons under the age of twelve years were committed to prison. We have prisoners in penal servitude who were under the age of sixteen years when sentence was passed. The Home Secretary does not appear, so far as we can judge from this report, to have interfered with any of these sentences. With children we may class lunatics, respecting whom the

Home Office seems to have displayed the same masterly inactivity. It is clear that several of these latter were lunatics when tried, convicted, and sentenced, and that the fact was known (or at least, ought to have been known) to the prison authorities before the trial. Thus at Gloucester a labourer, aged 78, was received on the 30th of August and not tried till the 16th of October, when he was sentenced to three months' imprisonment. He is described as "insane" when admitted, the form being "senile dementia," and in the column "Whether known to have been previously insane," the entry is "Yes." At Leeds a man admitted to prison on the 25th of February is described as of unsound mind when admitted. He was sentenced to twelve months' imprisonment on the 9th of March. A man admitted at Lewes on the 3rd of July, and sentenced to three years' penal servitude on the 22nd, is described as insane when admitted, the form being "acute mania." At Lincoln a man who was convicted of murder and sentenced to death on the 2nd of July, was certified to be insane after conviction. He had been in prison since the 23rd of March. He was suffering from "delusional melancholia," described as "hereditary." At Knutsford a woman, described as insane on admission, was tried 14 days afterwards for attempted suicide, and sentenced to 12 months' imprisonment with hard labour. She had been previously insane, and the form of insanity was "acute mania." At Liverpool, a man described as insane on admission, was after nine days' detention sentenced to ten years' penal servitude for attempted murder and suicide; and another, who was of unsound mind when admitted, and had been previously confined for insanity, was sentenced to two years' imprisonment, after being in custody for more than three weeks. At Nottingham, a man who had been previously in an asylum and is described as weak-minded on admission, was tried and sentenced to six weeks' imprison-

ment, after remaining in prison for more than two months. This list cannot be regarded as complete, and the proportion of insane persons whose condition should have been known previous to trial, will appear very large,¹ if we bear in mind that the table chiefly consists of persons who were not sent to prison until after trial and conviction. In these latter cases we cannot blame the prison authorities, although we think that the prisoner's condition should sometimes have been sufficiently apparent when placed in the dock, to induce a properly constituted tribunal to pause and make inquiries before proceeding to conviction and sentence. A man at Manchester was sentenced to two months' imprisonment for stealing 5s. 6d. He is described as "imbecile" when received into the local prison, the imbecility being congenital and previously known. At Plymouth a man was sentenced to two months' hard labour for stealing a brass ornament. He is described as insane when admitted, previously known to be so, and the cause "heredity." At Portsmouth a man, sentenced to two months' hard labour for wilful damage, was found to be imbecile, to which a remark was appended: "Was imbecile on admission, but symptoms became more acute after 47 days." (It appears from the dates that he was sent to a lunatic asylum at the end of six weeks; but for that time this imbecile was no doubt treated as an ordinary prisoner.) When, in addition to these cases of insanity, we find that two or three prisoners died of *delirium tremens* within so short a time after conviction as to show that they were suffering from an acute attack of that malady when tried, it seems clear that the precautions taken with regard to the mental state of the prisoner in the dock were not always adequate. Other prisoners must have been tried when in

¹ Besides leading to the punishment of lunatics, neglect on this subject may lead to the liberation of dangerous lunatics when the proof of the act charged is deficient.

a dying condition. At Devizes a man died ten days after being sentenced to two months' hard labour, the cause of death being "coma supervening on a congestive attack in the late stage of general paralysis of the insane." Another prisoner died of softening of the brain eight days after his conviction. A woman died of chronic alcoholism on the day after she was sentenced, and another on the very day of the trial. More than one died of consumption within a very short time after conviction. Thirty-five prisoners died within a week after being sent to prison, the total number of deaths being 143.

In connection with this subject, we may refer to the length of time that some insane prisoners were detained before being sent to a lunatic asylum. This is most conspicuous at Parkhurst. A prisoner described as mentally "weak" on admission, the cause being "hereditary deficiency," was sentenced in 1896, and only removed to an asylum in 1901. Another whose mental state is described as "doubtful" on admission, in 1895, was not sent to a lunatic asylum until after his sentence of five years' penal servitude had actually expired, though by what authority he was detained longer at Parkhurst does not appear. Another prisoner, in whose case congenital deficiency is also alleged, and who had previously been insane (though reported of sound mind when committed), was detained in penal servitude for more than a year after his mental state had attracted the notice of the prison authorities. There are many similar cases. Parkhurst, indeed, supplied upwards of 20 lunatics during the year embraced in the return, and more than half of these remained in the prison for a considerable time after being certified as insane. We presume there is special accommodation for prisoners of this class at Parkhurst. But even at the local prisons more than one prisoner served out, or almost served out, his sentence before being sent to an asylum. At Cardiff, a prisoner sentenced to nine

months' hard labour on the 30th July, 1901, was sent to an asylum on the 25th March, 1902. A note states that his sanity was doubtful all through. A man at Liverpool, described as of unsound mind at admission and previously insane, was convicted on 1st of March and sent to an asylum on the 16th of October. In Manchester, a man was sentenced to three months' imprisonment on the 26th of January, and sent to an asylum on the 17th of April. He was "epileptic and peculiar" on admission, his mental failure resulting from an old injury to his head. At Durham a man was sentenced to a month's imprisonment on the 23rd of January, and sent to a lunatic asylum on the 24th of February, after his sentence had actually expired. These instances might be added to. In fact, this system of making a prisoner serve out his sentence in the ordinary way, and sending him to a lunatic asylum at the end of it, appears to be not unusual. We apprehend that if deemed sane enough to undergo his sentence, he ought also to be deemed sane enough to obtain his liberty after he has served it.

The lists of deaths in prison, and of liberations on the ground of ill-health, are also suggestive. The report justly comments on the number of dying persons sent to prison by the magistrates, the date of their deaths—not unfrequently while under remand—clearly showing that the prison authorities were not to blame, though trial and imprisonment may have hastened the end, if not destroyed the chance of recovery. As a further example of the carelessness of some magistrates in this respect, it may be mentioned that the Prisons Commissioners state that a large portion of the paupers committed to prison for refusing to work at the workhouses, are found to be physically unfit for work when received into prison; and they give some illustrative examples. One would imagine that when a person committed for refusing to work is

reported to have been physically incapable of working, the Home Secretary would forthwith grant him a free pardon ; but great is the *vis inertia* of the Home Office, and nothing appears to have been done. But though many persons were in a dying state when sent to prison, in other instances the fatal termination of the disease must have been foreseen for a considerable time by the prison authorities, and yet there was no release on the ground of ill-health. Phthisis or tuberculosis in its various forms seems to have been the most ordinary cause of death, the prisoner frequently not being at an advanced stage (if suffering from the disease at all) when sentenced. Chronic bronchitis, chronic heart disease, and senile decay, are not of unfrequent occurrence ; and the fact that these deaths occurred in prison becomes more remarkable when we find that other persons suffering from the same diseases were liberated on medical grounds. However, if we exclude the liberations for pregnancy, those granted on medical grounds were very few indeed, the Home Office apparently becoming progressively harder in this respect. Prisoners suffering from infectious diseases are sometimes liberated, in order to prevent the disease from spreading, and where an operation becomes necessary there is sometimes a liberation, owing, we presume, to there being no conveniences for treating such patients in prison. But in the majority of cases, persons suffering from incurable diseases were left to die in prison, and we do not read of any liberation on the ground that further detention might endanger the prisoner's life. In the convict prisons, with a daily population of over 2,500, there was but one liberation for ill-health— a male prisoner suffering from locomotor ataxy contracted before his imprisonment ; and in this case more than 15 months elapsed between the conviction and the release. No woman was released from Aylesbury on the ground of ill-health, though there were on an average 15 on the sick list, of

whom 11 were in hospital—10 per cent. of the entire number. It can hardly be doubted that the power of releasing prisoners on the ground of ill-health has, of late years, been used too sparingly. In connection with these deaths, we may notice that two were the result of injuries inflicted while in prison, but they are passed over without comment in the table.¹ Some of the prisoners appear to have died after their sentences had expired, but probably they were too ill to be removed. A case worth mentioning is that of a debtor who died in prison. He was sentenced to three weeks' imprisonment in April, when he may have been in good health, but the execution of the committal order being left to the creditor, he was not arrested till the 27th of September. He was then suffering from pneumonia, and died of it in prison nine days later. Whether his death was due to the arrest and imprisonment we can only guess, but the creditor may have thought that the friends or relatives of the debtor were more likely to pay the necessary ransom for a sick man than for a healthy one. We hope to find in the next report a statement as to what punishments (if any) were inflicted on sick and insane

¹ With regard to the two men who died of injuries inflicted while in prison, I find that in a different part of the Volume (p. 39), the Medical Inspector ascribes the death of one to injuries self-inflicted when suffering from delusions, and that of the other to a fall when trying to escape. It is difficult to reconcile this explanation with the particulars given in the table. The man at Manchester died from fracture of the 5th and 6th cervical vertebræ, producing paralysis of respiration. The Governor reports that there was no escape or attempt to escape during the year, and, moreover, the death caused by attempting to escape plainly occurred at Wandsworth. A fracture of the cervical vertebræ is not the kind of injury which we should expect to be self-inflicted by a man labouring under delusions. The explanation looks like an attempt to exonerate the prison officials. What inquiries did the Medical Inspector make before laying it before the public as the correct one? It is noteworthy that the local medical officer makes no reference to this case in his report; but then he does not mention any death as having occurred, though the number for the year was 11 males and 4 females. In the case of violent deaths in prison, we think the public should at least be informed whether an inquest had been held, and, if so, what was the finding of the jury. We are curious to know what the verdict was in the case of the prisoner who was killed in Manchester Prison.

prisoners during the time that they were dealt with under the ordinary prison rules. The report says nothing of releases on the ground of innocence or doubtful guilt, but it seems to be as difficult to influence the Home Office on these grounds as on those of mental or bodily disease. On the whole we fear that the duty of the Home Secretary, as moderator of sentences, is not being performed in an adequate or satisfactory manner, and that a reform of the methods at present adopted by the Criminal Department is one of the first tasks which the new Home Secretary ought, in the public interest, to undertake.

The larger part of the volume, as already stated, consists of reports from subordinate or local officials, a considerable portion of which are neither interesting nor useful. In many cases, however, the prison functionaries paint everything in rose colour when dealing with generalities, but proceed to mention some details which are hardly consistent with these generalities. Thus, we have already noticed the considerable amount of illness which existed at the Female Convict Prison at Aylesbury—the amount being larger, when we bear in mind the ages of the inmates, one of whom died in prison of an incurable disease; but we are told in general terms that “the sanitary condition of the prison has been good (there has been no case of infectious disease), and the general health of the prisoners has been most satisfactory.” Again, as to the conduct of the prisoners, we read that, “with a few exceptions,” it has been “satisfactory.” “There has been a marked decrease in the number of punishments as compared with the previous year, and the number of prisoners punished has also declined, although the average daily population was about the same.”¹ The chaplain improves the picture: “There are few congregations outside where the singing, responding,

¹ Can it be that the ill-conducted prisoners were released and the well-conducted detained?

and reverent attention was more conspicuous." He had 17 celebrations of the Holy Communion, with an average attendance of 16, and 10 of the inmates were confirmed. But out of 170 prisoners who were at the prison during the year (the daily average being 117), it seems that 54 were at one time or other in hospital, and two were sent to lunatic asylums, while 37 incurred punishment, the offences being in ten cases sufficiently serious to call for a regular trial before the Visiting Justices. There were 99 offences, so that most of the 37 convicts who were punished must have offended more than once. When we add an attempted suicide, and the death already alluded to, it seems clear that Aylesbury is neither a sanatorium nor a terrestrial paradise. As a rule, we should advise the reader not to trust to general statements in any case where there are no details to check them by. The chaplains (who all appear, so far as these extracts go, to belong to the Established Church) are no doubt worthy men, but a little too much given to singing their own praises—at least, in an undertone; nor, perhaps, will the public feel as much interested as the Birmingham chaplain in the fact that "the Scriptural cartoons hung in the chapel have been framed and glazed, and the chapel walls painted and coloured, all by prison labour. We have vases filled with flowers and renewed every Sunday on the altar." But they may feel still less interested in the Governor's statement (duly printed and laid before them) that "the cart-road leading to the stone-yard has been taken up and relaid to suit heavy traffic." We have not attempted to wade through all these reports, and we do not recommend any of our readers to undertake the task. Selection and suppression is much needed.

An interesting table in the report is that relating to the cost of maintaining prisoners in our prisons. Brecon, for instance, seems to be an admirably conducted prison, but

the cost of the staff amounted to more than £70 per annum for each member of the average prison population. There are many other instances in which the cost of the staff seems to us to be quite out of proportion to the duties which it has to perform. In these times, when the removal of prisoners from one place to another can be effected so cheaply and speedily, the desirableness of keeping up such prisons is open to serious question. In the convict prisons, too, the expenses of the staff appear to be abnormally high.

We conclude with two further comments which, perhaps, should have been introduced at an earlier stage. Looking at the dates when prisoners were certified as insane (especially at Parkhurst), it is strongly suggested that some functionary paid periodical visits (at considerable intervals), and certified the insanity of a batch of prisoners at each visit. This strikes us as a very undesirable course. And having regard to the manner in which the Home Secretary consults extern physicians in murder cases, where the defence is that death arose from natural causes, we fail to see why similar aid might not be called in when questions of sanity arise, or why a well-known expert like Dr. Forbes Winslow should have been refused permission to visit the unfortunate Mary Ansell. There is too much officialism and departmentalism all round, and we fear that the opinion of the official physician often carries more weight at the Home Office than that of an outside one, in whose judgment the public would place much greater confidence. Our other remark refers to what is known as the Star Class of convicts, consisting of first offenders. We find in this report, for instance, that since this distinction was introduced, 124 female convicts who were in the Star Class were released, not one of whom has returned to penal servitude. Surely this fact affords a strong reason for a more liberal exercise of the prerogative of mercy towards prisoners in this class; but we do not learn that their sentences have been shortened in a larger

proportion than those of other prisoners. The officials, who should be the first to understand and give effect to the import of criminal statistics, are, we fear, often the last to do so; and so long as their proceedings are wrapped in mystery (which is highly undesirable from the point of view of the public, however convenient it may be to themselves), there is little hope of extensive improvements. Publication, criticism, and discussion may be almost regarded as essential conditions of real progress.

APPELLANT.

II.—CONSIDERATION IN THE ENGLISH LAW OF CONTRACT.

IN a recent criticism of my article on "The Doctrine of Consideration,"¹ exception seems to have been taken by a Scotch jurist to the following expression of opinion:² "The Scotch system [of contract] is simple and effective; but it may not be acceptable on account of its rigidity:" and objection is further taken to the support of such an opinion by reference to—in the words of my critic—"such a comparatively little known work as 'Paterson's Compendium.'" This reference to inadequate authority (although it was given merely as a ready mode of reference to the systems prevailing in England and Scotland respectively) seems to constitute the gist of my offence; for my critic, in a treatise published in 1891,³ appears to have arrived at a very similar conclusion,⁴ namely, that it is in respect of this very doctrine of consideration that the English law of contract has become less "rigid" than the Scotch.

¹ *Law Mag. and Rev.*, Vol. XXXII, No. 324, pp. 272—292.

² *Ibid.*, p. 279.

³ *The English Doctrine of Consideration in Contract*, by Richard Brown, Professor of General Commercial Law, St. Mungo's College, Glasgow.

⁴ *Ibid.*, p. 36.

The same writer, moreover, in a different part of his treatise,¹ quotes from Pollock's *Law of Contract*, 5th ed., p. 168, the opinion that, but for the retention of the principle of Consideration in simple contract, the English law of Contract might have become assimilated practically to that of Scotland.

It may, accordingly, be not wholly useless, by way of addendum to the original article,² to take some note of the searching criticisms which this writer³ passes on the English doctrine of Consideration, with the object of arriving at a definite conclusion as to the purpose intended to be served by the doctrine in English law, and as to the question of that purpose being in fact adequately fulfilled.

It will be convenient, with this object in view, to cast a hasty glance over the Scotch law of contract, before endeavouring to meet the objections raised to the English doctrine of Consideration by the Scotch writer in the treatise referred to.⁴

Consideration, in its English sense, has no place in the law of Scotland.⁵ As a consequence of this, we find that "Every agreement in a lawful matter, though constituted only verbally, induces a full or proper obligation,"⁶ and this, as "a common rule of law," is given as "the obvious reason why all verbal agreements and promises must be obligatory in every nation where no special exception is made by positive institution."⁷ The reasoning exhibits a circular form: and the principle laid down is vague and undefined: as will be seen presently, it suffers limitations in practice, and in its application is restricted by rules of evidence.

¹ *Ibid.*, p. 29.

² *Law Mag. and Rev.*, Vol. XXVII, No. 324, pp. 272—292.

³ *Eng. Doc. of Consideration.*

⁴ *Idem.*

⁵ *Ibid.*, pp. 13, 16.

⁶ Erskine's *Institute of the Law of Scotland*, Bk. III, tit. 2, s. 1 *Eng. Doc. of Consideration*, p. 17.

⁷ Erskine, III, 2, 1.

As a further consequence of this state of the law, it may be assumed that an important position will be assigned to written evidence in the formation of contract. The Scotch law seems to follow the Roman, in so far as to recognize a division of contracts into real, verbal, written, and consensual;¹ but, "as there is nothing in the law of Scotland analogous to the *verborum obligatio*, we may, without impropriety, apply the appellation of verbal obligations to such as have no special name to distinguish them by."² Of this kind are, *first*, promises, where nothing is to be given or performed but upon one part, and which are always gratuitous; *secondly*, verbal agreements (so called in contradistinction to promises), which require the intervention of two different persons at least, who come under mutual obligations to one another . . . and they differ chiefly in the different manners of proof which are required by the usage of Scotland to support them."³ Then, with regard to the mode of proof: "All contracts and bargains relating to moveable subjects, which have known prestations naturally arising from them, are by our law capable of proof by witnesses to the highest extent—which has been introduced for the more free currency of trade . . . But the testimony of witnesses is rejected in all bargains where writing is either essential to their constitution . . . or where it is commonly used . . . this means of proof [*i. e.*, by witnesses] is also received . . . where something is to be mutually given or performed by either party . . . but it is absolutely rejected, let the sum be ever so small, in promises which are merely gratuitous."⁴ There is this further peculiarity in the proof of gratuitous promises: "Donation is that obligation which arises from the mere liberality of the giver. It is sometimes constituted by

¹ Erskine, III, 1, 17.

² That is, presumably, those which fall under neither of the heads of consensual or real, nor are reduced to writing.

Ibid., III, 2, 1.

⁴ *Ibid.*, IV, 2, 20.

writing; but a verbal obligation to gift moveable subjects, which is usually called a promise, is equally effectual with a written obligation, and may be proved against the promiser by his oath . . . Lord Stair is of opinion (Bk. 1, tit. 10, s. 4) that promises are effectual without being accepted by the donee . . . and Stair's opinion is agreeable to our practice. His Lordship distinguishes between promises and offers (*Ibid.*, s. 3), which last do not, in his opinion, infer an obligation upon the offerer till acceptance . . . But in the general case [it must be acknowledged that], though a donation should be made in the form of an offer, yet if the offerer do not insist on acceptance from the other party, it can hardly be distinguished from an absolute promise where acceptance is presumed."¹

We see, then, that in the law of Scotland, although every verbal agreement in a lawful matter, gratuitous or otherwise, is taken to be a full or proper obligation, yet, except in the case of those agreements where two or more persons "come under mutual obligations to one another," the application of the "common rule of law" becomes restricted to a certain method of proof: for, apparently, a gratuitous promise will not be supported unless it be evidenced by a writing attested and delivered (or in holograph), or be admitted by the person charged when put upon his oath.

But, furthermore, in practice this rule of law undergoes limitations of a very comprehensive description: for, "obligations and contracts which fall under neither of these classes [consensual or real] were, in the civil law, constituted by stipulation . . . with us, writing delivered is requisite for matters so elusory . . . The written evidence, which is necessary in the description of cases now stated, is useful and easily applicable to all sorts of contracts, and now forms the usual evidence of all contracts and obligations."²

¹ *Ibid.*, III, 3, 88.

² *Bell's Com.*, I, 336.

It may be said, generally, that in the law of Scotland, "in order to constitute a full and perfect obligation, there must, on the part of the obligor, be a deliberate consent and engagement to him who is to have the right of exacting performance It is necessary to an effectual obligation, that the contracting parties shall be agreed on all the essential points of the engagement."¹ Deliberate consent—excluding error, force or fraud—seems to be the one essential condition of a contract or promise that will be enforced in law; yet this unrestrained freedom of entering into binding engagements is more apparent than real, when we regard the special rules of evidence that apply to gratuitous promises, and the usage by which writing is held essential to a large class of engagements, and "now forms the usual evidence of all contracts and obligations."

If this review of the salient features of the Scotch system may be accepted, we are afforded a ground of comparison with the English system; and we may now proceed to deal with some objections that have been taken to the quality of consideration as a test of validity in simple contract.

It has been said² "that the only claim to usefulness set up on behalf of the doctrine of Consideration in modern times, is its supposed effect as a legal form leading to greater deliberation on the part of contracting parties;" and that, in this its main purpose, the English doctrine of Consideration fails.³ The question is worth considering; for, if this fundamental objection cannot be met, the sooner the useless archaic survival is lopped off and we revert to the Scotch system the better.

It may be confessed that some modern writers on the law of contract⁴ have lent countenance to this view of the matter, by directing attention more to the historical develop-

¹ *Bell's Com.*, Vol. I. Bk. III, pt. I, p. 313.

² *Eng. Doc. of Consideration*, Richd. Brown, p. 32.

³ *Ibid.*, p. 40.

⁴ *Ibid.*, pp. 26—32.

ment of the doctrine than to the essential quality contained in it; when attention is directed mainly to an ever-continuing attenuation of the notion of adequacy—through all the phases of *quid pro quo*, benefit or detriment—it may well seem to a Scotch writer that all we have left is *form*, and very little of that. Now, without disputing the appropriateness of the remark made by Chief Justice Holmes,¹ that “Consideration is a form as much as (is) a seal,” it is important to remember that you can scarcely have had form without substance, even although that substance be not always perceptible in the form. In tracing out the history of Consideration in simple contract, we have an instance which “well illustrates the paradox of form and substance in the development of the law.”² The form may remain, while the substantial reason for it may have been lost or forgotten; but “the old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.”³

It is a manifest error, however, to say: “The conclusion is irresistible that it (*i. e.*, the doctrine in question) is matter of form and nothing more, having no other *raison d'être* than the *stipulatio* of the Roman law.”⁴ *It would be more correct to say:* that the presence of Consideration is the substantial means whereby contractual engagement may be effected on the faith of mutual promises⁵ without the adventitious aid of form: and, in this its historic and essential characteristic, it is the exact antithesis of the stipulation. It has already been pointed out⁶ that the main purpose of the earlier formalities necessary in the Roman law “to elevate an agreement to the rank of contract” was to insure delibe-

¹ *The Common Law*, p. 273.

² *Ibid.*, p. 35.

³ *Ibid.*, pp. 5, 36, 37.

⁴ *Eng. Doc. of Consideration*, Richd. Brown, p. 32.

⁵ It is apparent that, even if there be present performance on one side, the principle of mutuality remains.

⁶ *Law. Mag. and Rev.*, Vol. XXVII, No. 234, p. 275.

ration and "certainty as to the nature and terms of the contract:" and the same may be said of the formal contract (under seal) in English law: but it seems to be an entire misapprehension of the nature of simple contract, as practised in English law, to say, that consideration is a mere form leading to greater deliberation on the part of contracting parties.

The truth is: that, whatever support to such a notion may be extracted from judicial dicta or English text-writers, the value of the doctrine, tested by utility, is seen in the practical result of the long series of cases where adaptability to ever varying circumstances is the leading feature. Its great merit has been that, conceived in an uncongenial alliance between contract and *assumpsit*,¹ it has, by requiring the nurturing attention of the judges, evolved a clear principle in the development of contract² which has been of inestimable service: in this way, the English law of contract has been saved from those crystallizing tendencies pointed out by Chief Justice Holmes,³ to which a rule of law becomes liable after the circumstances in which it has arisen have been forgotten.

We can now fitly contrast the respective systems of law, as applied to contract, in the two countries. In Scotland, the common rule of law is⁴ that all verbal agreements and promises are civilly obligatory, the one essential condition appearing to be consent or promise deliberately expressed on the part of the obligor or promisor. We find, however, that this simplicity and freedom have become fettered by rules of evidence, which require special methods of proof in special cases;⁵ and are subject to a further disadvantage

¹ *Law Mag. and Rev.*, Vol. XXVII, No. 324, p. 278.

² *Ibid.*, pp. 273, 283, 286.

³ *The Common Law*, pp. 5, 35, 36, 37, 150-151.

⁴ Erskine, III, 2, 1; *Bell's Com.*, III, 1, 313.

⁵ *Bell's Com.*, III, 1, 336; Erskine, IV, 2, 20; 2, 1; III, 3, 88.

in the difficulty of distinguishing between an offer and an absolute promise. In England, on the other hand, we have agreements by specialty and agreements by parole; and the practical effect of the doctrine of consideration is to exclude gratuitous promises from enforcement unless put in special form. Taking the alternative resource, as exemplified in the Scotch law, one may have no reason to regret that Consideration has retained its place in our law to the present day.

RANKINE WILSON.

III.—THE PROGRESS OF PRISON REFORM.¹

IT is now between eight and nine years since an agitation was started in the London newspapers, and in the influential monthly reviews, in favour of more humane and efficient methods of dealing with the convicted population undergoing sentences of imprisonment and penal servitude in the great penal establishments of England and Wales. It was contended by the advocates of reform that the penal treatment of convicted prisoners was at once harsh and ineffective. It was pointed out that some prisons were seriously overcrowded; that prison food was unfit both in quality and quantity to sustain the prisoner in health; that prison punishments were far too numerous and severe; that prison labour was of a needlessly degrading character; that little or no provision was made for juvenile prisoners; that there was no proper classification of prisoners; that there were no incentives to industry and good behaviour in local prisons in the shape of remission of sentences; that, in fact, the whole machinery of prison administration had degenerated into a condition of apathetic and traditional routine. In support of this view it was pointed out that

¹ This article was in type before the issue of the Report of the Commissioners of Prisons, 1901-2.—Ed. *Law Mag. and Rev.*

a Government Commission, presided over by the late Lord Kimberley, had arrived at the conclusion that imprisonment, as carried out in this country, "not only failed to reform offenders, but produced a deteriorating effect upon them." In this country it is considered to be the primary and supreme business of government departments to uphold the excellence and impeccability of whatever happens for the moment to exist. When the authorities were confronted with the demand for prison reform, they immediately retorted that there was nothing in the treatment of the prison population requiring reform. They denounced the advocates of reform as sentimentalists, notoriety hunters, and sensation mongers. All the old and familiar methods of casting odium on the advocates of progress were resorted to. But fortunately the public mind was impressed with the plea for reform, and in June 1894 the Home Secretary of the day was compelled to appoint a committee to inquire into the conditions of life in English prisons. The labours of this committee lasted for nearly a year. There were too many retired officials on it to make it a thoroughly unbiassed and efficient committee. Nevertheless this committee, as a result of its inquiries, arrived at the conclusion that not only convict prisons, but the whole prison system, local as well as convict, was open to the reproach that it failed to reform the people committed to its charge.

It is one thing to get a Parliamentary or departmental committee to report in favour of certain changes and improvements, it is quite another thing to get a responsible minister to undertake the work of reform. As a rule, it is only as the result of strong external pressure that a minister of the Crown will undertake to make any alterations in the department over which he happens to preside. The officials of his department have become accustomed to certain ways of doing things. They have been educated to follow out a traditional code of regulations. The permanent head of a

great government department is generally an oldish man whose mind has got into a particular groove, and who dislikes the idea of change. It is from this official that a minister gets the details of his information. Such a man is usually able to make it appear that the proposed changes have been tried before and would not work, or, if they have not been tried before, that they are open to all sorts of objections and dare not be tried. Unless a minister has had a prolonged experience of his department, he is unable to meet the objections of his subordinates, and it is only when he is driven forward by the irresistible pressure of public opinion that he is in a position to obtain legitimate and indispensable reforms. Before the Prisons Committee presided over by Mr. Herbert Gladstone, official after official came up to say that no changes in prison administration were necessary. They asserted that the food was sufficient, that the conditions of prison labour could not be materially altered, that, in short, there was nothing the matter with the system as it stood. Had official opinion been accepted and acted upon, no change whatever would have taken place in the treatment of the prison population. Fortunately for the cause of prison reform, official opinion was overborne by public opinion. Both in Parliament and in the press the agitation for reform continued, and the Home Secretary was thus enabled to press forward with changes which officialdom had ridiculed and opposed.

First of all I will mention the reform of prison labour. One of the most futile and debasing forms of prison labour is the crank and the treadwheel. In no civilised community, except our own, are these instruments of punishment resorted to. Labour on the crank and the treadwheel produces no useful result in any shape or form. The picking of oakum is a low and humiliating type of industry; but even the oakum picker knows that his efforts will have some useful results; he knows that the oakum he has just

finished will ultimately be put to some useful purpose; he knows that the time he has spent in picking it is not altogether wasted. But the prisoner at the crank or on the treadmill has no such consolation; he feels that the outcome of all his efforts is merely to make a wheel go round. It is difficult to describe the degrading and heartbreaking effect which a useless process such as this has upon a population like ours, accustomed as it has been for generations to productive industry. It is possible that the idle and untutored savage might not feel the humiliation of the crank or the treadmill; he has little idea either of the dignity or of the value of labour. It is otherwise with civilised men, even if they are prisoners, suffering for crime. All of them know something of the worth of labour; all of them have a feeling that effort should be directed towards some useful end; all of them look back with a sense of satisfaction to the results of a good day's work. It should be the business of the State to stimulate these feelings in the prisoner's breast; to make him realise that labour, wherever it may be performed, is never useless; that diligence and industry, even in a prison, will always have their reward. It is impossible for the State to stimulate these wholesome sentiments under a *régime* of the crank and the treadmill. These instruments in our penal machinery are designed for the very purpose of making the idea of effort and industry degrading. They are calculated to infuse a hatred of all kind of work into the mind of the man who is subjected to them; and it is very remarkable, in going through prisons, to note the difference in spirit and temper between the man who has been grinding at the crank and the man who has been engaged in productive industry. In the one case you meet the sullen, sour, embittered countenance, which bodes no good for the future when the days of imprisonment are over. In the other you find that the results of a day's useful industry have conferred a certain

atmosphere of cheerfulness and manhood upon the broken occupant of a prison cell.

It is a satisfaction to be able to say that the Home Secretary has ordered the crank and the treadwheel to be abolished. The Commissioners of Prisons, in their Report for 1900-1, tell us that "this form of penal labour may be said to be in its last stage." "Of the 39 treadwheels and 29 cranks in operation in 1895 (that is to say, at the time when the agitation for the abolition of these instruments began), only 13 and 5 respectively now remain. It is proposed in due course to abolish these, as soon as satisfactory substitutes can be found for the hard labour prescribed by rule 39 for prisoners in the first stage. Experience goes to show, that in these prisons where the treadmill has been abolished, the necessary deterrence of first-stage hard labour is well maintained, by the strict separation of prisoners while employed in some onerous task, such as stone breaking or heavy coal sack making." Official testimony, which was either adverse or apathetic in the matter of the crank and the treadwheel, is now forced to admit that the deterrent effect of imprisonment is in no way diminished by the abolition of these barbarous methods of punishment. But it has taken officialdom seven long years to come round to this frame of mind. Only one question remains to be asked with regard to the crank and the treadwheel. Why is it that any of these things still remain in our prisons? The answer of the Prisons Commissioners is that satisfactory substitutes have not yet been found. It is very remarkable that the Prisons Commissioners should take such a very long time to find satisfactory substitutes. In all these affairs "where there's a will there's a way." If substitutes for the crank and treadwheel can be found in some prisons, substitutes can be found in all. If the central authorities would only exercise a little zeal in this matter, if they would only take the trouble to stir up and assist their subordinates

in the local prisons, the crank and the treadmill would soon become relics of the past. But when will promptitude become anything more than a mere aspiration in the public service. It takes a government a generation to accomplish things that private enterprise would complete and have done within a month. It is only right to add that we owe much to Mr. Ernest Flower, the energetic Member for Bradford, for keeping this question, as well as many other matters connected with prison treatment, before the House of Commons and the country.

The movement for the abolition of the crank and the treadmill was merely part of a larger movement for *the substitution of industrial for merely punitive discipline* in the treatment of the prison population. The prisons department had allowed prison industries to languish and decay. When one industry failed, little or no attempt was made to put another in its place. The result of this doing nothing attitude was that the opportunity of accustoming convicted prisoners to habits of industry was lost. The value of industry as an elevating and ameliorative agency was forgotten, although Howard a century before had said: "Teach men to be industrious and they will be honest." Until a few years ago our local prisons were rapidly sinking into the condition of punitive machines and nothing else. It was little or no use appointing chaplains and schoolmasters to serve in them. The whole routine and atmosphere of the place were adverse to the success of their efforts. Many of these officials felt this to be the case. They knew that unless their efforts were seconded by the general drift of the prison system that they were practically labouring in vain. A prisoner who is being benumbed and demoralised for the greater part of the day by a vicious prison system is not a hopeful subject for the schoolmaster or the chaplain. When his term of detention expires, he is a worse man than he was before it began. He is more

demoralised and therefore more dangerous. The only sure way to deter an offender is to reform him, and the best way of reforming him is to begin by accustoming him to habits of useful reproductive industry. These are simple and obvious facts, but it required a long and bitter controversy to get them accepted by the English Prison Department.

Let us mark the result of the adoption of industrialism in prisons, as recorded in the report for 1901 of the Comptroller of Prison Industries. "The present report is not concerned with the story, interesting though it be, of the varying fortunes of prison labour during this long range of years (46 years). But it may be permitted to me, in quitting the sphere of actual participation in the solution of the many difficult problems which cluster round the labour question, to record my profound belief in the soundness of the progressive industrial policy inaugurated during recent years, and my most sanguine anticipations as regards the success of that policy in the future. Each successive year since 1896 has been marked by a steady increase in the value of the labour performed. The year just closed, 1900-1, outstrips all its predecessors in this respect. The value of the work on manufacturing industries alone shows an advance of 11 per cent. on the previous twelve months, and of no less than 41 per cent. on the figures for 1896-7." These results, the report continues, "speak for themselves." "Briefly, they have been attained, not so much by extending the scope of our industries in new directions—though a good deal has been done in that way—as by consolidating and developing some of the more recent of our improved industrial methods. Practical effect has been given to the fundamental principle that it is our duty to see that every prisoner committed to our charge should, wherever it is possible, be regularly employed in some useful and helpful occupation, and no opportunity has been lost of enlisting the interest of the prisoner in the work set before him."

The deteriorating effect of prolonged *cellular confinement in practical isolation* is a point which has been strongly insisted upon by modern advocates of prison reform. It is gratifying to relate what the Comptroller of Industries has to say on this matter: "The concession," he says, "to well-conducted prisoners, of the privilege of working in strictly regulated association, continues to exercise a humanising and stimulating effect. More than 5,300 local prisoners, a large proportion of whom would have formerly been strictly confined to their cells, may now be seen working in properly supervised groups, with a degree of interest and assiduity which is pleasing to witness. More than one governor has drawn my attention to the striking contrast between the normal expression of countenance of the associated prisoner and that of the solitary worker in a cell—the former animated and alert, the latter more or less apathetic and depressed. This in itself is surely valuable evidence in favour of the change of system." Prison officials are now beginning to realise the value of prison industry as a reformatory agency, and the Comptroller of Industries takes occasion to note this fact in his report: "I have mentioned," he says, "in some of my earlier reports, what I take to be one of the most interesting and hopeful signs of the times—the gradual growth of a firm belief among prison officers in the moral and material advantages of well-organised prison labour. I note this change with much satisfaction, because great though the progress made during the past few years has been, much yet remains to be done." Since the report from which these extracts are taken was written, the enlightened official who is responsible for it has passed away. But his final words remain as a testimony of the highest and most unprejudiced kind to the value of the movement in behalf of Prison Reform. Reforms of the kind which the late Mr. Duncan describes did not originate in the Prison Department itself; they took place as the outcome of pressure

from without. It is the task of all Prison Societies to exercise this pressure with wisdom and prudence, but, at the same time, with immovable tenacity and persistence. The task of industrialising prison labour is not yet completed. Much, as Mr. Duncan reminds us, remains to be done. Our duty is to keep a close watch upon the process of industrialisation, to wake up the Department when it exhibits signs of slackness, and to be satisfied with nothing less than the establishment of the whole machinery of prison discipline upon a healthy and wholesome industrial basis.

But *the industrialisation of prison discipline* was only one plank, although a most important one, in the platform of prison reform. It was also contended that prisoners were improperly and insufficiently fed, with the result that when they were liberated they were in many cases so weak and emaciated that it was impossible for them to obtain employment or to keep it if they got it. If a prisoner is so badly fed in prison that he is unfit for work when restored to liberty, he has only two alternatives before him: he must either beg or steal. But what is the use of punishment if it has a deplorable outcome like this. What is the use of putting a man in prison if he is forced by the severities of the prison system to commit fresh crimes immediately he is released. A system constructed on the principle of making a man unfit to earn his living is manifestly a vicious system. Yet this has been the system in use in English prisons since they were taken over by the central government in 1878. It was a favourite maxim in high official quarters that the prisoner was to be fed on the bread of affliction and the water of affliction. No account was taken of what was likely to happen when a prisoner treated in this fashion was again set at liberty. The question was never seriously asked: Is this kind of treatment likely to diminish crime? Is it likely to deter the offender from committing fresh

offences? All these elements in the case were forgotten. The security of society, which is the supreme object of punishment, was left out of sight. The mere barbarian instinct of retaliation was put in its place. So long ago as 1843, when Sir James Graham was Secretary of State, the principle was laid down by him that "diet was on no account to be made an instrument of punishment." Prison reformers appealed to this wise and statesmanlike utterance, but they were met with ridicule as visionaries and sensationalists. It was useless to answer that Sir James Graham was neither a visionary nor a sensationalist, but a cautious, sober, conservative statesman. It was useless to say that this opinion of his was not a mere casual utterance, but the deliberate order of a man acting in his capacity as a high executive officer of the Crown. That diet was not to be used as an instrument of punishment was constantly met by the unproved assertion, that if prison food was improved prisons would be flooded with tramps and vagrants in search of food. Yet such was the power of this mere assertion, that successive Secretaries of State were frightened to move in the direction of a more humane prison dietary. At last we have had an experiment. In May, 1899, the Medical Inspector of Prisons tells us a tentative dietary for short term prisoners was substituted for the punitive dietary in use since 1878. Has this dietary, as was predicted, filled the prisons with vagrants and petty offenders? Has it attracted this class to prisons for food and shelter? Has it justified the alarms of those who said that any change in prison food was dangerous? Nothing of the kind. Here is what the medical inspector says in his annual report: "The number of receptions (to prison) both this year and last year, compared with like periods when the old dietary was in force, proves that the fear expressed that this diet would attract was groundless."

I freely admit that a great State should never commit

itself to rash and headlong adventures. But there is a mean between this rashness and a condition of shivering timidity which hesitates to move at all. It is a sad commentary on English administrative methods that a great public department should be terrified for more than half a century to test the validity of Sir James Graham's dictum, that "diet was not to be regarded as an instrument of punishment." Here is an important principle in prison treatment—one of the most important of all—the truth or falsehood of which it is not difficult for the responsible authorities to test. Yet they will not put themselves to the trouble to test it, until they are compelled by external pressure to do so. There was a vast amount of presumptive evidence in favour of an improved prison dietary. It was the commonest thing in the world for discharged prisoners to complain that they were too weak to work when set at liberty. It was a well-known fact that a high per-centage of them lost weight during their enforced stay in prison. It was no unusual thing for judges and magistrates to be told by a re-convicted offender that he wanted to work and was anxious to work when his last sentence had expired, but that he was too weak to work when he emerged from the prison gates. Apart altogether from prisoners' statements, there was ample evidence to show that the prison dietary was deserving of serious consideration. Yet nothing, absolutely nothing, was done. The demon of immobility and routine held officialdom in its grasp. To suggest in official circles that there might be something amiss with the dietary was to run the risk of being denounced as a crank or something worse. In this country nothing but agitation will shake the official mandarin out of his slumbers. Agitation means hard work and plenty of odium, with the result that the mandarin as a rule is allowed to slumber. All the time the machine of administration is going to the dogs. It is only when some grave calamity takes place, as at the

beginning of the late South African war, that the public begin to find out that something is wrong. But object lessons of this kind are not to be had in every department of the public service. And so we go muddling and blundering along, as Lord Rosebery says, for years, and, as in the case of prison dietary, sometimes for generations, doing an infinite amount of mischief in the meanwhile both to the individual and the State. It would be rash to say that prison dietary is even now on a satisfactory footing. But it is something to be thankful for that a step is being taken in the right direction.

Unfortunately, the Prison Department is as yet not a very enlightened branch of the administration, as is shown by the wretched muddling over the vital statistics in the last few Blue Books. Some of us believed that it would be an excellent thing to get a medical man on the Prisons Board, so that the public and Parliament might be presented with a trustworthy and up-to-date account of the mortality and morbidity among the prison population. It must be confessed that up to the present our hopes in this respect have not quite been realized. The Medical Commissioner has allowed a complete muddle to be made of the mortality statistics. As these statistics stand, it is quite impossible for the reader of the annual reports of the Prison Commission to tell what is the rate of mortality in prisons. The late Medical Inspector, to his credit be it said, followed the true principle of calculating the rate of mortality in prisons on the daily average population in prisons during the year. For some inscrutable reason the excellent table in which the annual rate of mortality in prisons was recorded has been abolished in the last two Prison Blue Books. No reason whatever is given for this capricious, uncalled-for, and reactionary change. Students of prison administration and members of Parliament suddenly find that this invaluable table has disappeared. No

explanation is given of the reasons for omitting the annual table of mortality. It would, at least, be only courteous to the public to tell them why and on what grounds they are henceforth to have no table recording the death rate of the prison population. It is intolerable that officials should resort, without a note of comment or apology, to high-handed proceedings of this kind. The death rate in prisons in proportion to the average prison population is a vital element in judging the worth of prison administration. It is admitted by every competent statistician that the only way in which mortality in prison can be approximately compared with mortality in the outside population, is by having a table of prison mortality based on the average number of prisoners in confinement throughout the year. Abolish this table, and you abolish the only means the outside world has of ascertaining how imprisonment affects the health of the prisoner.

In the Prison Report for 1900-1 an attempt is made to foist a new and utterly worthless table of vital statistics on Parliament and the public. According to this ridiculous table, the death rate in local prisons does not amount to as much as one per thousand of the population. When I state that in the general population between the ages of 15 and 55 the death rate is as high as 8 per thousand, it will be seen what a wonderfully healthy place a prison is, according to the wiseacre who constructs the vital statistics of His Majesty's jails. A local prison, on this gentleman's system of calculation, is at least twenty times a healthier place to live in than any other spot in England—twenty times healthier in fact than any other spot on the surface of the globe. Mr. Andrew Carnegie is credited with saying that he would gladly give more than half of his colossal fortune to any one who would undertake to make him live ten years longer. He has only to apply to His Majesty's Commissioners of

Prisons to get his aspiration gratified. According to their Blue Book a prison is a perfect paradise of health. All they have got to do is to send their Blue Book on to Mr. Carnegie, and to invite him to take up his quarters in a prison cell. The only difficulty I foresee in the matter is that Mr. Carnegie, being a man of business and not a Government official, would require to have these wonderful figures relating to the healthiness of prisons checked before accepting them as an accurate statement of the facts. What would the indispensable checking process reveal. In the first place, it would show that while the death rate in local prisons is drawn up on one plan, the death rate in convict prisons is drawn up on another. In the local prisons the death rate is calculated per hundred of the population. In the convict prisons, for some mysterious reason, this method of calculation is abandoned, and the death rate is calculated per thousand of the prison population. Surely, if a death rate is worth recording at all, it should be recorded in accordance with a common standard. The Registrar-General calculates the death rate of the free population in his annual report at so many per thousand. One would think that this standard would be good enough for the Prison Department. But no: it seems they must institute a capricious standard of their own, which they adhere to on one page and abandon on another. In the next place, an examination of the figures would show that an egregious blunder has been made in working out the death rate among the convict population. The words of the Commissioners' Report for 1901 say (page 38): "There were 27 deaths amongst the males and two amongst the females, giving a death rate of '107 per 1,000 of the average population." The average population of convict prisons amounted in 1900-1901 to 2,696. A simple calculation, which could easily be made by a boy in the fourth form of an elementary school, would show that the real death

rate in convict prisons is over 10 per 1,000. That is to say, it is more than ten times higher than the death rate recorded by the official figures. Is it not time that this sort of silly blundering disappeared from our government returns? When are we to get prison returns on which the ordinary man can rely? A very great number of statements in official returns it is impossible to check. We have no means of checking them. It is only here and there that the chance occurs of testing the accuracy of official statements. When they are tested, as in the case of these convict death rates, we find them hopelessly unreliable and at variance with fact. More than fifty years ago Thomas Carlyle said: "Governments have really to a fatal and extraordinary extent neglected in late ages to supply themselves with what intellect was going, having, as was too natural in the dim time, taken up a notion that human intellect, or even beaver intellect, was not necessary to them at all." I do not ask the Government to give us anything fit to be dignified with the name of intellect in the prison service. As Carlyle has said, routine and red tape traditions are against such a course. But we might at least plead to have simple sums in elementary arithmetic accurately done. If we cannot find accuracy in official returns in the casting up of simple figures, how can we expect these returns to be correct in matters of greater complication? It is not pleasant to have to come forward and fix responsibility on anybody. One would always rather praise than blame. But it is impossible to deny that the Prisons Commissioners, who are ultimately responsible for their own annual reports, are seriously to blame for allowing these documents to go before the public without proper supervision. The very essence of an official report is that it should be accurate and trustworthy. The only way in which the public can know anything at all about prisons is through prison reports. The Prison

Department is, as far as the ordinary man is concerned, a secret service. He knows nothing about it, and can know nothing about it, except what it pleases officials to tell him in their annual reports to the Home Secretary. If he find errors in these reports his confidence is shaken; he does not know what to believe.

In dealing with the progress of Prison Reform it would be useful to discuss such questions as insanity in prisons, suicide in prison, and other matters of a kindred nature. But one does not know how far the figures relating to these important questions are correct. The Prisons Commissioners take no pains to verify them. They may be right or they may be in the same muddle as the death rate. At the present moment I would advise the public to place very little confidence in prison statistics as we have them presented to us in the annual Blue Books. It is evident that these statistics are not drawn up in a careful and competent manner. It is evident that they are not checked by the men ultimately responsible for them, that is to say, the Prisons Commissioners themselves. Until the statistical returns relating to the prison population are drawn up on intelligible and modern lines by competent men it is useless discussing them; we may be discussing fictions instead of facts. The only points in regard to Prison Reform which we can be reasonably sure about are, that the improvement in prison dietary which has come about after so much agitation has had excellent results all round. It has apparently improved the health of the prisoner when under detention; it has made him more fit for work when his period of imprisonment has expired; it has made it less probable that the casual offender will degenerate, as the result of bad prison treatment, into a habitual criminal. All this is distinctly to the good, and deserves to be recorded as a great step in the direction towards a rational prison system. Another step of equal

importance in the same direction is the industrialisation of prison discipline. It is something to be thankful for that the old idea of the militarisation of prison discipline is giving way before the true conception of what a prison ought to be. A prison is not intended to prepare soldiers for the army but citizens for industrial life. It has cost an immense amount of agitation to get this reasonable principle accepted. It is only just to the Prisons Commissioners to say, that they are now working for the industrialisation of prison life. Its complete industrialisation has not yet been accomplished. When it is at last completely done, it may be some time before the results manifest themselves to their full extent. But that these results, when they do come, will be beneficial to the prisoner and to the community of which he is a member is unquestionable.

W. D. MORRISON.

IV.—REVERSAL OF JUDGMENT: INTEREST ON MONEY ORDERED TO BE REPAYED.

ONE would suppose that it was a matter of not unfrequent occurrence, that judgment having been entered in favour of a plaintiff for a sum of money with costs in a court of first instance, the judgment should be satisfied under stress of execution, and that the Court of Appeal upon reversing the judgment should order the repayment of the sums so paid. It is remarkable therefore that any doubt should exist as to whether the defendant under these circumstances is entitled to the repayment of his money with interest. Yet such a doubt exists. In an action (*Lloyd's Bank v. Moseley*) brought to recover a sum of about £1,100, Wills, J., in August 1901, gave judgment for the plaintiffs with costs, and refused a stay of execution

upon the express ground that the plaintiffs' solvency being undoubted, and they being in a position to make good use of the money, it was proper that it should be paid to them forthwith. Nothing however was said—and upon such occasions as little as possible is said—as to what was to be done in the event of the decision being reversed. On the 7th of August, 1902, the Court of Appeal entered judgment for the defendant, and counsel for him thereupon asked that the money paid to the plaintiffs in respect of debt and costs just twelve months previously should be repaid with interest from the date of payment. Repayment of the sum paid in respect of debt and costs was ordered as of course, but as to interest the Court asked for authority, and counsel not being prepared with authority no further order was made, the Master of the Rolls saying that a special arrangement should have been made in the Court below.

The White Book is silent on the subject. Ord. LVIII, r. 19, provides that on an appeal from the High Court interest for such time as execution has been delayed by the appeal shall be allowed, this being a corollary of Ord. XLII, r. 16, which embodies the statutory provisions of 1 & 2 Vict., c. 110, ss. 17 and 18, that every judgment debt (which includes costs) shall carry interest at the rate of 4 per cent. from the time of the entering up of the judgment or order. But these rules do not in any way deal with repayment. They were made, as will presently be shown, in pursuance of an Act which was the last of a long series designed to protect plaintiffs who were being harassed by frivolous appeals or proceedings in the nature of appeals. Successful defendants were little thought of.

We turn to Seton and Daniell. The former says (*Forms*, 6th Ed., p. 186): "Where money had been paid under an order, and the order was reversed on appeal, repayment was ordered with interest at 4 per cent." (Citing *Rodger v. Comptoir d'Escompte* [1869], L. R., 3 P. C. 465, and *Merchant*

Banking Company v. Maud [1874], 18 Eq. 659.) "But," continues the editor, "this has not been usual in Chancery, unless a special case for interest has been made out. (*Parker v. Morrell* [1848], 2 Phill. 453.)" Daniell (*Chancery Practice*, 7th Ed., p. 1082) speaks more confidently. "When money has been paid in obedience to an order which is subsequently reversed on appeal, the person who has paid it is entitled to have it repaid with interest at the rate of 4 per cent. from the time at which he paid it." And in addition to *Rodger's Case*, *supra*, there is cited *Imperial Mercantile Credit Company v. Coleman* [1871], 40 L. J., Ch. 262; *contra*, *Parker v. Morrell*, *supra*. And there authority and expressions of opinion end.

Let us examine these authorities and the history of the recognition of interest by the Courts generally. At Common law a writ of error was a *supersedeas* and prevented execution issuing, a fact of which a judgment debtor was always ready to avail himself. "Though a party be hung up never so many years by a writ of error" is a quaint sentence occurring in an old judgment in *Winter v. Lightbound* ([1721], 1 Str. 300). The attention of the Legislature seems early to have been directed to this, and as far back as 3 Hen. VII, c. 10, an Act was passed "against delaye of execucon upon Writte of Error and to geve Coste," which, after reciting that "writtes of errour were oftymes sued out to thentent oonly to delay execucon," provided that, upon affirmance of judgment or discontinuance of error or non-suit, the person against whom the writ of error was sued should "recover his costs and damage for his delay and wrongful vexacion by the discretion of the judge before whom the writ of error is sued." A later Act of the same reign enjoins the putting of the first one into force. 3 Jac. I, c. 8 (for the further protection of a successful plaintiff) enacted that no execution should be stayed or delayed upon any writ of error or *supersedeas* thereupon,

unless the person or persons bringing such error should enter into recognizances with two sureties in double the amount of the sum recovered by the former judgment, to satisfy and pay (if the judgment were affirmed) the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution. A statute of Charles II (13 Car. II, st. 2, c. 2, s. 10) provided that, if the judgment were affirmed, the person bringing the writ of error should pay to the defendant in error double costs for the delaying of execution, and it was held in the Exchequer Chamber, in *Shepherd v. Mackreth* ([1749], 2 H. Bl. 284), that the double costs were by way of a collateral and further remedy, and not in lieu of the damages given by the previous statutes. The damages were computed on the basis of interest, generally at 4 per cent., upon the original judgment debt, and 1 & 2 Vict., c. 110, only stereotyped an existing practice. It may be here observed that a plaintiff who had once recovered judgment in a Court of law was placed in a peculiarly favourable position by the Act of Henry VII and its successors. The ordinary creditor had no claim for interest. "Money lent," said Lord Tenterden, as recently as 1829 (in *Page v. Newman*, 9 B. & C. 380), "does not by the practice of half a century carry interest." And it needed a statute (3 & 4 Will. IV, c. 42) to enable juries to allow upon debts and sums certain, interest at a rate not exceeding the current rate from the time when such were payable by virtue of some written instrument, or if payable otherwise, then from the time of demand in writing and notice that interest would be claimed.

But all this has little to do with the practice in restitution, except to show that an unsuccessful defendant who had no friends willing to guarantee twice the amount of the judgment debt must pay under pain of levy or caption. But once become a successful plaintiff in error, he could always

sue out a writ of *Sci. Fa.*, and in a very old case (*Sympson v. Fuxon*) reported in Cro. Jac. 699, it was held that if judgment were reversed in error, a writ of restitution would be awarded to inquire what profits the party had taken *colore judicii prædicti*. [The *Sci. Fa.* was probably unnecessary where the plaintiff had levied and been paid, *semble* per Holt, C.J., in 2 Salk. 588.] "The plaintiff in the writ of error," it goes on to say, "is to be restored to all he lost." This principle apparently gives us all we want, if words are to be understood in their popular meaning. But read in the light of times when interest was not recognised by the law (even the statute of Will. IV speaks guardedly of interest—"a jury may give damages in the nature of interest"), the absence of the words "with damages" puts a sad limitation upon the words "all he lost."

The case of *Parker v. Morrell* came before Lord Cottenham in 1848, when he reversed the order of the Court below, under which £1,560 had been paid by the defendant to the plaintiff. Application was made that the money should be repaid with interest, when on hearing from the registrars that in the absence of any special direction from the Court payment of interest would not be inserted in the order for repayment, the Lord Chancellor said that no special case had been made before him in this matter, and the order was for payment of £1,560 without interest.

The Common Law Procedure Acts did not alter the old practice. A writ of error (or, to use the expression first employed in the Act of 1854, notice of appeal) continued to be a *supersedeas*, subject as before to this, that an unsuccessful defendant who appealed had to give bail, while an unsuccessful plaintiff who sued out error was under no such restriction (*James v. Cochrane*, 9 Ex. 552). It was not until after the Judicature Act that appeals ceased as a matter of course to operate as stay of execution.

In 1871 the question of restitution with interest came

before the Privy Council in the case of *Rodger v. The Comptoir d'Escompte de Paris (supra)*. In pursuance of a judgment of the Supreme Court of Hong Kong, the petitioners had paid to the respondents, who were bankers, sums amounting to over 60,000 dollars in respect of a judgment debt and costs. Upon appeal to the Privy Council it was ordered that the judgment of the Supreme Court should be set aside and a nonsuit entered. In obedience to that order the Court of Hong Kong directed (*inter alia*) the repayment of the sums paid by the petitioners to the respondents, but decided that it had no power to give in addition interest thereon. The matter accordingly came again before the Privy Council, when the petitioners' argument was based upon the words of the order being wide enough to require the Court to allow interest, without which substantial justice could not be done. It was further urged that a Court of Equity, in an unreported case, upon reversal of its decree by the House of Lords had, upon petition, ordered repayment of money with interest, and the words of *Sympton v. Juxon*, above referred to, were especially called in aid. The facts of the case were also emphasised, and in particular that the respondents were bankers who presumably for four years had used the money in their business. Lord Cairns in giving judgment said that one of the first and highest duties of all Courts was to take care that the act of the Court, that was, the act of the Court as a whole, from the lowest which entertained jurisdiction to the highest which finally disposed of the case, should do no injury to any of the suitors. If in the case then under consideration the petitioners recovered the money, wrongfully withheld from them for so considerable a period, without the ordinary fruits which are derived from the enjoyment of money, injury and very grave injury would have been done them. He believed that, so far as precedents applicable to the case were concerned, (and here

his Lordship's reasoning appears to be somewhat vague,) they would be found to be in favour of restitution with interest. He skimmed lightly over the thin ice which differentiated the proceedings in writs of error. "They were of a highly technical character. It was a matter of great rarity for a writ of error not to suspend execution." And so on. The Privy Council evidently meant to lay down a definite principle for the future, and not to inquire too closely into the precedents of the past. And so in the only reported cases following on *Rodger v. The Comptoir d'Escompte, The Imperial Mercantile Credit Association v. Coleman*, decided a few weeks later ([1871], 40 L. J., Ch. 262), Lord Hatherley ordered repayment with 4 per cent. interest; and in the *Merchant Banking Company v. Maud* ([1874], 18 Eq. 659), Bacon, V.C., said he adopted the decision of the Privy Council as laying down a just and reasonable rule, which ought to prevail in all cases. And there authority ends. Nor is the practice as to the allowance or disallowance of interest so clearly established as to call for none further, even in the Chancery Division; for in the case of *Lloyd's Bank v. Molesey* there were sitting with the Master of the Rolls two such masters of Chancery practice as Stirling and Cozens-Hardy, L.JJ.

It is strange that the Privy Council having laid down, or purported to lay down, a clear and business-like principle with regard to the allowance of interest on money repaid *qua* judgment debt, should stop there, and refuse to allow it upon money repaid *qua* costs, the more so when that principle was laid down without much regard to precedent. "Their Lordships," said Lord Cairns, "did not consider that interest should be paid upon the costs, because it has never been, in any proceeding that their Lordships are aware of, the habit in ordering the refunding of costs paid under a decree to order that refunding with interest; and there may be obvious reasons applicable to the case of costs differing

from the reasons which applied to gross payment of another description." It is difficult even for the legal mind to see what those obvious reasons are. Money paid over *qua* costs would have been as useful to the owner as money paid *qua* judgment debt. In a well-known case in which a great quantity of evidence had been taken in India, the Court of Appeal reversed the present Master of the Rolls, then a judge of first instance, and the plaintiffs, a stay being refused, paid to the defendants by way of taxed costs nearly £2,000. Fifteen months later the House of Lords in turn reversed the Court of Appeal, and the £2,000 was duly repaid, but, in view of *Rodger v. Comptoir d'Escompte*, without interest. The plaintiffs, who were Lancashire manufacturers, could not see why. Is it too much to hope that in these days when at length attempts are being made to tax costs on a uniform principle, and to make them approximate as far as possible to the fair indemnity which should be the right of a successful litigant, the question of allowing interest upon money ordered to be repaid under the circumstances above related should receive some attention, and a practice be established which does not call for argument upon each several occasion, and which shall commend itself to the sensibilities of business men?

J. K. F. CLEAVE.

V.—THE HAMBURG MARITIME LAW CONFERENCE.

A FIRST and most important step towards the adoption of an international maritime law will have been made by the work of the meeting of the Comité Maritime International at Hamburg (September 25–27 last), if the draft treaties there approved, which put into proper shape the resolutions adopted at former conferences with regard to

unification of the national laws governing collisions and salvage of ships, can obtain international diplomatic consideration and sanction. At all events, the representative character of the national associations which have agreed upon them, and the actual substance of the proposals themselves, should ensure a sympathetic consideration of their merits from the governments chiefly interested in maritime law, and especially that of Great Britain. It is not, of course, likely that all the changes proposed will be embodied in treaties or laws in their present shape, at any rate for a considerable time. For instance, in our own law of collision, the proposal to abolish the exemption of the shipowner from liability for damage caused by the fault of a pilot compulsorily put in charge of his ship; and that to substitute, in case of fault in both ships, for our present method of dividing the loss equally, the system adopted in Belgium and in the new German Code (1900), of apportioning the damage in such a case between the two ships in proportion to their relative degree of fault, not only as between the two ships, but also between all the other interests, *e.g.*, cargo—will have much opposition to overcome. But in principle our present system, on these two points, has little to commend it. The presence of a compulsory pilot on board a ship is required by all systems of law, but in none besides our own is he put in exclusive command of her; and in the case of ships in foreign waters, a series of decisions has established that the compulsory presence of a pilot on board who only acts as an adviser to the captain, “a living map or chart,” does not confer this privilege on the shipowner in our courts. As regards our rule of division of loss, it is well known that its retention as the governing rule in our courts by the Judicature Act, instead of the Common law rule allowing neither party to recover anything in such a case, was an afterthought, and the origin of the rule itself may have been a misconception. Our courts have also found

it a little difficult to reconcile the Admiralty rule with the Common law one, and consistently with the latter to find both ships to blame except under the statutory presumption of blame attaching to a breach of the Collision Regulations, or in cases where these do not apply—*e.g.*, collisions between national ships and private ships—by holding that the initial negligence of one ship could not have been avoided by the other except by the exercise of more than ordinary care. A third alteration in our present law, in fixing a limitation of two years for collision actions, should be adopted without difficulty. One noteworthy omission from the collision treaty is that of the resolutions adopted by former conferences of the Comité, that shipowners should have the option of limiting their liabilities in tort (except personal injury), and certain cases of contract, either *in rem* (according to the general Continental system, the value of ship and freight) or *in personam* (according to our method of a sum fixed by the tonnage of the ship); but this is only politic in view of the sharp division of opinion still prevailing in England on this point. In this connection, the proposal made by a German lawyer (Dr. Gutschow of Hamburg) to abolish shipowners' liability altogether may hereafter receive more consideration than it did on this occasion. Its author justified it in principle on the ground that a shipowner's liability for the acts of his servants navigating his ship is an exception to the general rule established by the German Code (Art. 831), that a master is only liable for the faults and neglects of his servants or agents employed in his business if he is negligent in choosing them, and that the principle of *respondeat superior* does not run through the whole of English law; while, from a business point of view, the universality of insurance and the essentially fortuitous risks of navigation make it immaterial both to underwriter and shipowner, on the average, whether a ship on which a loss is claimed for damage by

collision is itself the cause of loss or not, and the expenses of litigating this question would be avoided. No doubt the same result could equally well be obtained by a general agreement to this effect between underwriters of ships; but even as a legal principle it does not seem very far removed from the older legal ideas according to which collision might be only a peril of the seas admitting of no compensation, as is still the case in some laws, if its cause is "inscrutable." As regards the salvage treaty, the fact that it follows the present English law throughout (omitting the statutory reward for life salvage), should be enough to secure for it the support of our Government.

The second subject discussed by the Conference, namely, the question what courts should have jurisdiction over collisions happening in territorial waters (leaving on one side collisions happening on the high seas), is one of considerable interest and difficulty in International law. The British principle is one rather convenient than scientific, basing *compétence*, either *in rem* by seizure of the offending ship, or *in personam* by personal process or its equivalent, upon the owner of the ship. In the United States, Federal courts obtain jurisdiction either by process *in rem*, or by the fact that there is property of the owner of the offending ship within their jurisdiction which can be seized (our "foreign attachment") up to the limit of the value of that property, or by the ordinary personal process, but the jurisdiction of the State courts depends on the last named test exclusively; and where both ships are foreign their courts do not generally exercise jurisdiction. The various foreign systems also attribute *compétence* to the following courts:—(1) that of the place of collision (*e. g.*, Belgian, Japanese), and of which a recent example is given in the decision of a mixed tribunal in Egypt (Clunet, *Journal du Droit International Privé*, 1902, p. 896); (2) that of the home port or port of registry of the offending ship (all systems except our own and that of the

United States); (3) that of the domicile of the defendant (Belgian, German, Japanese); (4) that of the nationality of the plaintiff (French); (5) that of the place where defendant has other property (German, Japanese, Hungarian). The conclusions of the Conference were in favour of (1), though this was against the votes of the English, German, French, and United States representatives; (2) and (3), as also of the court of the place of seizure of the offending ship; while the tests of nationality, attachment of property, and personal process were disapproved. The claims of the first-named *forum*, in principle, are that the cause of action arose and the offending *res* may be seizable within its territorial sovereignty (like our principle of jurisdiction founded upon personal presence of the offending person), while in practice the *forum* is one independent of the choice of the parties, and acquainted with the *locus in quo*; but it has the disadvantages of not being the place where the ship or the defendant is actually accessible to the plaintiff, and of having no means of enforcing its judgment. The second and third are recommended both by principle and practice; but the fourth has only practical convenience to support its retention, and there is something to be said for the amendment moved by M. Autran, of Marseilles (which was lost), to limit its jurisdiction to *mesures provisoires et conservatoires, i. e.*, obtaining security from the ship to abide by the decision of a court competent to deal with the merits of the case (*au fond*). Another amendment to the same proposal, made by Dr. Sieveking, the eminent President of the Hanseatic High Court, to limit it to the value of the offending ship and freight, as being all that by its situation within the jurisdiction is internationally subject to that court, was similarly rejected; and in view of the recent decisions of our courts—allowing judgment against a ship in a damage cause for a sum greater than its value (though in view of our limitation of liability to a fixed sum per ton, this should be

of rare occurrence) to be enforced against that ship if coming again within the jurisdiction, or against any other property of the same owner—there might be a difficulty in introducing this provision into our law, however consistent it is with the foreign conception of the shipowner's liability being confined to the particular *res* only and depending on the existence of that particular ship. The foreign systems on this point certainly seem more scientific than our simple standard of mere presence of the ship or its owner within the jurisdiction ; and the lawyers of the Continental States, which necessarily, owing to the closeness of their political, legal, and commercial relations to each other, have had to consider this question with more care than ourselves, may well be disinclined to revert to what is undoubtedly a looser system. A consideration which has weight in this connection is, that so long as British shipping retains its predominance, it would not be to our disadvantage to admit the jurisdiction of the courts of the domicile of the shipowner or the port of registry of the ship for this purpose.

A third subject on the programme of the Conference, namely, what law should govern property in ships, mortgages and liens, was not discussed for want of time ; but the reports made by the national associations showed clearly the extreme diversities of municipal law on this subject. To take only the case of liens or privileged claims against the ship (which are not the same in all countries), whether *ex contractu* such as salvage, pilotage, wages, disbursements, and bottomry, or *ex delicto* for damage by collision, perhaps the chief difference between our law and that of the Continental nations generally is that except, perhaps, for giving priority to the latter lien over the former ones, our law treats them all as of equal quality, ranking in the inverse order of their attachment upon the *res*, while the foreign systems generally (except the United States, whose law is similar to our own) give effect to them in a fixed order

determined by their nature irrespective of the time when they were incurred. Thus, in the Belgian, French, German, Italian, and Japanese law, salvage, pilotage, and wages come first; while the lien for collision, which with us and the United States would rank first of all, comes fifth in order in the Belgian law, seventh in the Italian law, and ninth in the Japanese law. The English representatives (who included the Lord Chief Justice, Mr. Justice Phillimore, Mr. Carver, K.C., Dr. Stubbs, and Mr. Marsden) suggested the adoption of the Continental method, placing first salvage, then wages, necessities, master's disbursements, and bottomry in order of date, and then damage, unless incurred subsequently to the other liens, when it would precede them, on the principle that so far as possible each claimant should have the security of the property in the condition it was in when his claim arose, subject to other claims subsequently attaching. Some such system of discrimination would be more satisfactory in principle, and give more certainty to creditors of ships as to their relative position to each other. The Continental systems, however, agree so far with the spirit of our system as to give priority to the claims arising on the last of several voyages over the others.

Whatever the actual practical results accomplished by the meeting may be, the resolutions already adopted, the discussions and the preliminary statements of the comparative municipal laws, show that on many points agreement on a common maritime law is possible; and the force and extent of the present movement among the maritime lawyers and shipping interests of the world, should show the Governments of the maritime States that it is time for them to consider the subject practically.

G. G. PHILLIMORE.

VI.—CIVIL JUDICIAL STATISTICS, 1900.¹

THESE statistics of proceedings in civil courts have been edited by Master Macdonell with his usual care and ability, and in a short introduction he draws attention to a few of the more remarkable features which the tables following disclose. The first point he deals with is that of appeals, and he points out that there was a slight decrease in appeals entered. This affected all the Appeal Courts with the exception of the House of Lords, in which there was a slight increase. On the other hand, there was a slight increase in the number of appeals heard; there being an increase in those heard in the House of Lords and Court of Appeal, but a decrease in the Privy Council and Appeals from Inferior Courts. There is an increase in the number of proceedings of all sorts begun, which is mainly attributable to the County Courts. There is, however, an increase in the proceedings both in the King's Bench Division and Borough Courts of Record. There is a slight diminution in the total proceedings in all courts heard. The proportions of cases begun and heard in reference to population do not seem to have varied in the last five years. "The figures tell of fixed habits, stability, and routine in regard to legislation."

As regards the all-important subject of costs, Master Macdonell has examined the subject of costs in appeals to the Judicial Committee, and is able to establish that such costs are by no means so high as is generally alleged; in fact, averaging about half the figure usually named. The costs in the House of Lords appear to be considerably heavier, the average being nearly double. We notice that one bill of costs before taxation amounted to £2,336, but the hearing lasted eleven days. While we are on the

¹ *Judicial Statistics, England and Wales, 1900.* Part II.—Civil Judicial Statistics. London: Eyre and Spottiswoode.

subject of costs it is interesting to note that the per-centage taxed off varied from 59·35, 58·24, 54·23, to 0·80. These figures are remarkable enough, but the figures of bills of costs in the Judicial Committee give even a wider range, as the per-centage taxed off varies from 63·39 to 0·43. Most of these exceptional rates occur where the bill brought in is of small amount, but there is one striking instance where a bill was brought in for as much as £1,111, and only 1·08 per cent. was taxed off. It is stated that the costs in the Court of Appeal of each party to an appeal actually determined would average about £50. It is not, however, quite clear whether this refers to all classes of appeals, or only to appeals under the Workmen's Compensation Act. An important point to which attention is also called is that trial by jury does not seem to be on the decline, but that there is a growing preference for special juries. In the last five years the per-centage of actions tried by special juries has risen from 19·64 to 23·50; by common juries from 23·15 to 29·85; and by Official Referees from 7·05 to 8·17. On the other hand, the per-centage tried before judges without juries has fallen from 50·16 to 38·48. Further points made are "that there is a distinct increase in the Commercial List and a marked decrease in the Order XIV List." We notice one curious fact in the latter list which looks almost like a mistake. In 1899, out of 293 actions disposed of, 35 were defended and 258 undefended; whereas in 1900, out of 253 disposed of, 228 were defended and 25 undefended. It seems impossible to explain this complete change of positions.

Considerable attention is devoted to the Circuits, and it is pointed out again, as it has been in former reports, what a steady decline there is in the civil business which, taking the average of the last five years and comparing it with the average of the five years 1881-5, shows a decline of over 10 per cent., although the population has increased nearly 18 per cent. There has been an even larger decline

in the criminal business, amounting to about 20 per cent. As regards the individual Circuits, the greatest decline in civil business has been on the South Eastern Circuit, where the average has fallen from 136 to 52. Adding civil and criminal business, the most marked decline has been on the Oxford Circuit, which shows a falling off of over 41 per cent.

As regards Chancery, Divorce, and Bankruptcy proceedings, there is not much to note; in all three branches the business seems stationary, with a slight tendency to decline. Petitions for divorce or judicial separation have diminished every year since 1897, and in 1900 were in the proportion of 2·17 per 100,000 of population in England; though in Scotland the proportion was more than double, being 4·52. Husbands and wives seem about equally successful in the results of their petitions. As might be expected, husbands apply more frequently for dissolution of the marriage than wives, the proportion being about 6 to 4, whereas in applications for judicial separation there are 86 applications by wives and only 3 by husbands. Only 19 decrees were granted in the latter suits, so probably in a large proportion of the cases the parties found it possible to come to terms and settle their disputes amicably. The results of the suits tried in Court were almost universally in favour of the petitioner, there being on husbands' petitions 304 verdicts or judgments for the petitioner as against 5 for the respondent, while on the wives' petitions there was no instance of a verdict for the respondent. There is a curious table showing the duration of marriages in suits commenced in 1900, when, rather to our surprise, we find the largest number of suits begun between 10 and 20 years of marriage. As might be expected, by far the greatest number of suits take place between parties who have no children.

It is interesting to note that the gross value of property admitted to Probate during the years 1900-1901 and 1899-1900, were respectively nearly 252 and 288 millions,

and payments for Death Duties in the same years were over 14 and 16 millions respectively.

The proceedings before the Railway and Canal Commissioners show an increase in the number of applications heard, though fewer applications were made; but we have been quite unable to understand many of the figures in the table.

The figures as to County Courts show a substantial increase in the number of proceedings, distributed over all the various forms, and amounting in the whole to over 32,000. It is very curious to observe that although judgments for so large an amount as £1,817,438 were obtained by plaintiffs on original hearings, it is within £24 of the amount similarly obtained the year before. As showing the nature of the cases brought in such courts, it may be noted that out of a total of 1,180,908 plaints entered, 1,166,734 were for amounts not exceeding £20, and that the average amount recovered in each case was £2 : 8s. 6d.

The figures as regards proceedings under the Workmen's Compensation Act, 1897, are interesting from more than one point of view. The total number of arbitrations in County Courts was 1,552, of which two-thirds were tried by the judge, and the amount of compensation awarded was £43,317 : 19s. 4d., and a weekly amount of £299 : 5s. 8d. The number of memoranda registered was 1,253, and the compensation amounted to £27,528 : 8s. 4d., and weekly payments £664 : 10s. 3d. As regards numbers of cases, the arbitrations in Court show a small, and the memoranda registered a substantial, increase on the former year. The Act, as might be expected, seems to be most in operation in manufacturing districts, as, for instance, Bow, which has had 64 arbitrations and 142 memoranda registered, as against Westminster's 8 and 1 respectively.

On the whole, the volume of civil business seems to be stationary, with a tendency to decline, which is most marked in the continuous and gradual decline of Circuit business.

VII.—THE CRIMINAL RESPONSIBILITY OF THE INSANE.

TO the ancient mythologists insanity was essentially a metaphysical problem, and they based their theories on the supposed intercourse existing between the material and spiritual worlds. The treatment of mental afflictions, therefore, was not unnaturally associated with the duties of the sacerdotal office.

It was not until the great Hippocrates appeared that any serious blow was struck at the metaphysical theories which up to then held the field. This famous physician really rescued the art of healing from the hands of priests and astrologers, and established it upon its only practical basis, the knowledge of the morbid and healthy functions of the human body.¹

With the advent of the Middle Ages the old metaphysical notions of insanity returned, and it is a matter of common knowledge how important a place the doctrine of diabolical possession occupied in mediæval theology. But about the beginning of the present century the physiological treatment of the subject, based upon induction and observation, began to make rapid strides, largely owing to the influence of the French school of alienists headed by Pinel, and to-day the problem of insanity, for all practical purposes, is regarded from the standpoint of physics, not of metaphysics.

It took a Solomon, according to the fairy tale, to imprison the genie in a vase, but no Solomon—medical or legal—has yet been found, who was able to confine the subject of insanity within the narrow and arbitrary limits of a definition. Mr. Justice Blackburn, when giving evidence before a Select Committee of the House of Commons,² said: "I have read every definition I could meet with and never was

¹ *Vide* Pinel, *Insanity*, translated by D. D. Davies, M.D., 1806.

² 1874.

satisfied with one of them . . . I verily believe that it is not in human power to do it." It would seem well-nigh impossible, indeed, to light upon a definition which would satisfy both the physician and the lawyer, since each of these approaches the subject from a different standpoint. To the physician insanity is merely a symptom indicating disease of the highest nerve centres, whereas the lawyer regards insanity only as a question of conduct, and is not concerned with the disease except so far as it affects conduct. Primarily speaking, however, insanity of course is a medical problem: it is only when the subject of responsibility comes into view that the lawyer steps in. And it is when the theories of scientists are brought into contact with the practical expediency required by law that we enter the dusty arena of controversy. Before discussing the relation which insanity bears to conduct, it is desirable to make some inquiry as to the nature of the disease. What is insanity? Insanity is frequently described as a disorder of the mind, but since many disorders of mind exist which do not constitute insanity, this loose definition is clearly defective. Sane people may suffer from hallucinations¹ or delusions;² for instance, an illogical man can be fairly said to suffer from disorder of mind, but it would be a hard thing were we to stigmatize every illogical or suspicious person as insane. Hysteria certainly implies "derangement of thought, feeling and volition," but it is a nervous condition which, though not incompatible with an insane neurosis, may, and often does, exist as something quite distinct.³

Amongst the many medical definitions of insanity, that of Dr. Maudsley is, it is suggested, one of the most satis-

¹ *Vide* case of Mrs. A—, cited in *Sanity and Insanity* (Mercier), pp. 102, 126.

² A delusion is a false belief as to existing facts. An hallucination is a false perception of the senses. *Vide* pp. 41 (note), 42,

³ Or to take the most common "disorder of mind," *e. g.*, dreams. Yet our waking consciousness corrects the disorder. The derangement is but temporary.

factory. According to him, "Insanity is a disorder of the supreme nerve centres of the brain, producing derangement of thought, feeling and volition, together or separately, of such degree or kind as to incapacitate the individual for the relations of life." This definition has the merit of indicating the existence of that hazy mental borderland where, although there is a departure from the normal, it is difficult to say there is actual insanity. And the great difficulty besetting all definers of insanity lies in the fact that there is no hard and fast line drawn between sanity and insanity. They melt into one another like the dissolving pictures of the magic lantern. Remembering this, it is easy to see that just as mental disturbance of a certain degree is wanted to constitute insanity from the physician's point of view, so a further stage of mental disturbance is required in order to constitute insanity from the lawyer's point of view. To give an imaginary example:—

A is an idealist. Temperament highly imaginative, as a result of which he lives in a world of his own. Would be regarded as sane, but unpractical.

Later on his idealistic views so distract his attention from matters of every-day life that the physician accounts him medically insane, and advises his friends to watch him.

A further stage is reached when a judge voids his contracts, or perhaps appoints a guardian to look after his property.

Finally, under the influence of the creatures of his imagination (expressing themselves in delusions or hallucinations), he commits some crime.

Thus from the start *A* may be described as a person suffering from disorder of mind such as to unfit him for the relations of life. From the first a physician would say there was present an insane neurosis, but although in subsequent stages there is more or less definite insanity of such a nature as affects conduct, it is not until the fourth stage that the question of criminal responsibility arises.

One reason, of course, for the difficulty felt in deciding whether we are dealing with sanity or insanity is, that there seems to be no one mental standpoint of sanity.¹ It is obvious that what may be regarded as sanity in a child may constitute insanity in an adult, for mental character varies, of course, at different ages and under different conditions. From the scientific point of view, each man's mind is a law unto itself. What would be regarded as normal in the case of a highly emotional man, might be abnormal in the case of an individual of phlegmatic disposition. Moreover, as noted above, insanity is a question of degree. There is, physicians have alleged, an insane temperament which, though not in itself constituting actual mental disease, may at any time and under the stress of some untoward circumstance, develop into actual disease.

No properly comprehensive classification of the various forms of insanity has yet been found possible by medical writers. A single case may indeed often present instances of forms diversely classified. For example, a case attended by a certain condition of moral perversion (described as "moral insanity") may precede a variety known as general paralysis of the insane, and this in turn may give way to dementia.² For purposes of this thesis, however, insanity may be classified, not so much with regard to its physiological symptoms, as with regard to its outward expression in words and conduct. The author suggests the following as a convenient classification for the medico-legal questions which usually arise :—

- (1) *Natural Insanity*—Idiocy (*dementia naturalis*).
- (2) *Acquired Insanity* (chronic). In idiocy the process of development has not been carried far enough : in lunacy it has been carried in a wrong direction :

¹ *Vide Mental Diseases* (Campbell Clark), Introductory chapters.

² Or the same case at different periods may present the phenomena of melancholia and mania.

one is mere weakness of mind, the other derangement of mind :

- (i) *Intellectual Insanity*—characteristic : delusion :
- (ii) *Emotional Insanity*—characteristic : disordered feelings and morbid impulses. Delusion may or may not be present :
 - A. With delusion :
 - B. Without delusion :
 - (a) Impulsive insanity :
 - (b) Moral insanity.
- (3) *Acquired Insanity* (acute). Dementia.

Acquired insanity may appear in a form which lawyer and doctor used invariably to call “partial insanity” (the precise meaning of which will be stated and discussed subsequently). In ordinary parlance it meant that a person was cranky in certain particulars, but apparently sane on other subjects. Perhaps the medical term “chronic” more accurately describes this limited insanity—as opposed to the term “acute” in describing the state of dementia, the last stage of mental disease preceding death.

For purposes of this article, the first and third divisions may be placed aside. In each case the insanity is so marked and so complete that the law has from time immemorial recognised such as outside its pale. Idiots are obviously irresponsible. Where the insanity is not so complete, where the faculties, though impaired, are not, to use an engineer’s phrase, entirely out of working order, then the question of responsibility admits of controversy. It is with insanity of this kind (2) that the following pages are concerned.

The classification here adopted does not claim in any way to be scientific. It disregards the symptomatic arrangement adopted by some medical writers (e.g., that of Dr. Skae), whereby mental disease is classified by its

physical manifestations with such labels as puerperal insanity, phthisical insanity; and the etiological arrangement adopted by others (*e.g.*, that of M. Morel), whereby mental disease is grouped according to the presumed predisposing causes, such as toxic insanity, hereditary insanity.

The present classification regards mental disease mainly as it affects conduct and individual responsibility. For instance, under the heading, "Impulsive Insanity" (a morbid alteration of the tone of the nerve centres generating violent and sometimes uncontrollable impulses) might come cases of puerperal insanity and epileptic insanity, or of toxic and hereditary insanity. But the general effect may be the same: the power of control may be weakened and a consciousness of the particular act to which the impulses have directed the sufferer, be for purposes of legal responsibility absent.

Before dealing with the subject-matter of the classification, some explanation of what the writer understands by the terms is desirable.

Strictly speaking, emotional insanity should be considered before intellectual insanity, inasmuch as morbid feeling invariably precedes morbid thinking. The morbid thinking or delusion is really but the attempt of the sufferer to find an objective reason for his subjective disturbance. Emotional insanity, however, is harder to diagnose (for although intellectual insanity connotes some measure of emotional insanity, the latter does not always express itself in intellectual perversion), since it is less obvious to the outsider and more obscure in its manifestations. Moreover, it is doubtful whether emotional insanity, unattended by marked intellectual disturbance, is recognized at law. It seems better, then, to deal with the more obvious and better recognized form of insanity—intellectual insanity—first of all, and then pass on to the consideration of emotional insanity.

By intellectual insanity is understood an insanity affecting the reasoning powers. It may of course be attended by a general morbid emotional condition and consequent impaired power of control, and it may exist with but little emotional disturbance. This form of insanity expresses *itself in delusions about a particular fact or class of facts, e.g., that the patient is Napoleon, or is persecuted by certain people.*¹ In the early years of the century this form of insanity was termed monomania, but the term has now fallen into disuse. It has also been called "partial insanity," though, as we note later on, the term is an objectionable one.

Emotional insanity is insanity expressing itself through the emotions and faculty of volition.²

It is called impulsive, when the emotions (expressing the general tone of the highest nerve centres) are so affected by disease, that the patient is driven by a kind of mental convulsion to perpetrate some sudden deed, in order to be relieved of the intolerable mental discomfort from which he is suffering. It is often as instinctive as when a man in severe pain flings out his arms in order to seek relief by some outward act. According as the act is one of killing or setting fire, etc., it is termed homicidal mania or pyromania, etc.

¹ Hence it differs in degree from the general intellectual derangement accompanying dementia.

² The emotions differ from those intellectual processes termed ideas, inasmuch as they (emotions) represent states of mind which are dependent upon the general tone of the single nerve centres, whereas ideas represent the relations existing between these states of mind. The former is attended physiologically by the discharge of grey matter from the nerve centres: ideas are attended by the passage of discharges from centre to centre. The former indicates what are one's sensations, the latter indicates one's perceptions. The emotional or affective life indicates the general temperament of the person: it expresses the fundamental tone of his nerve element. It is therefore of great importance, in cases of emotional insanity, to consider hereditary tendencies or the influence of physical diseases—more particularly what physicians call functional diseases, which imply nervous disorder, e. g., epilepsy, neuralgia.

Affective insanity is called moral, when the sudden impulse is absent, but there is general moral perversion, although no marked intellectual derangement. The crimes committed in this condition are mostly deliberate, and a layman would find it almost impossible to distinguish between moral insanity and ordinary depravity. In order to distinguish them, the physician has recourse to heredity, previous mental health, and all the circumstances of the particular case; but this branch of the subject, as one might expect, bristles with controversy.

I.—THE ELEMENTS OF RESPONSIBILITY.

Criminal law must necessarily be far narrower in its scope than morality, inasmuch as criminal law can be applied only to definite overt acts or omissions capable of being distinctly proved. And this points to the fundamental distinction between law and morality. Morality looks primarily at thought and feeling: law considers first and foremost the act. With regard to all serious offences—offences, that is, calculated to shock the moral feeling of the community—there exists a practical harmony between law and morals: and in dealing with criminal responsibility, so far as it affects the insane, we may presume that law and morality are working together. Legal punishment is then regarded as the outward and visible sign of moral disapproval. As by responsibility is meant liability to punishment, it is desirable to inquire what are the essentials of responsibility with regard to a particular act, and these seem to be as follows:—

1.—Knowledge:

2.—Power of control.

1.—The agent has knowledge¹ when he is able to appreciate—

¹ Dr. Clark points out (*Analysis of Criminal Liability*) that a want of knowledge, involving foresight as to consequences, has been often confused with the want of knowledge of the wrongness or punishability of the act and its consequences taken together.

- (1) The natural and probable consequences of his conduct ;
- (2) The moral quality attaching to his conduct, which moral quality must be considered with reference to the general moral sentiment of the community in which he lives.¹

(I) *The natural and probable consequences of his conduct.*

The law as a general rule presumes that every man knows the probable consequences of his conduct, though the presumption is rebuttable. If, therefore, it can be shown that a man did not know the natural and probable consequences of his action, then that person is not responsible ; *e.g.*, *A* is prevented by mental disease from knowing that the application of a light to gunpowder will cause an explosion. *A* is not responsible for the consequences of the explosion.

(2) *The moral quality attaching to his conduct.*

The ability to distinguish between good and evil, right and wrong, is held to be one of the tests of criminal responsibility, and has been so held since at any rate *Arnold's Case* (1723). Eminent lawyers, however, have been divided on the point whether or not the law ought to regard the moral appreciation as a necessary factor of responsibility. Sir James Stephen said, "One of the conditions which the law assumes in dealing with men is, that their moral feelings are on its side to the extent at all events of understanding that acts of atrocious wickedness are atrociously wicked, and that apart from law they ought not to do them." Baron Bramwell said, on the other hand, "I deny that, to my mind, the law has anything to do with it ; it simply intends to terrify the man, to threaten him ; it cares not what his views are on the subject, but says, this is a thing you shall

¹ Report Select Committee, Homicidal Law Amendment Bill, p. 40.

not do." Stephen's view has the most authority upon its side: certainly it is the juster, and as he said, "If the law were so constructed that people who were obviously thoroughly mad, and did not know the moral quality of their actions, were to be punished under it just as if they did know the moral quality of their actions, it would destroy all respect for the law."

2.—The agent has power of control when he is able to choose whether he shall do the act or not; *e.g.*, *A*, as the result of an impulse which he could have resisted, cuts off *B*'s head. It is immaterial whether the impulse be merely vicious or due to disease, so long as it was resistible. If *X* seized his arm and compelled him to do the act, or if a disease such as epilepsy caused an automatic activity of the cerebral cells, then he has not power of control.

Knowledge and power of control being then essential constituents of responsibility, the absence of either should create exemption from legal punishment.

The law deals only with acts, not with events. When therefore there is no mental relation preceding the event (meaning by mental relation both knowledge and power of control) the event does not become an act, and therefore falls without the scope of the law, the main object of any penal system being thus defeated. For whatever view may be taken as to the object of punishment—whether we place the reformation of the offender, retribution, or prevention in the foreground—yet surely the ultimate object must be the prevention of similar acts.

II.—SKETCH OF LEGAL PRINCIPLES (FROM 1625—1843).

With these preliminary remarks upon the nature of criminal responsibility we may pass on to consider the present state of the law as to insanity.

It is thus stated by Stephen:—¹

¹ *Digest Criminal Law* (Stephen), p. 20.

"No act is a crime if the person who does it is at the time prevented (either by defective mental power or) by any disease affecting his mind—

- (a) From knowing the nature and quality of his act ; or
- (b) From knowing that the act is wrong ; (or
- (c) From controlling his own conduct unless the absence of the power of control has been produced by his own fault)."

The parts bracketed are considered by Stephen as doubtful law, although he thinks they ought to be the law. Without the bracketed portions, the criterion of responsibility may be summed up as one of knowledge—a knowledge of the ordinary and probable consequences arising from the act, and an appreciation of its moral quality.¹

If the bracketed portions were law, then the criterion of responsibility would no longer be one of knowledge only. It postulates the twofold inquiry : Did he know what he was doing ? If so, could he help doing it ? There is a certain restriction, however, attached to the second inquiry, so that it really amounts to this : If he was unable to help doing the act, was his want of control brought about by his own default ? Now from a consideration of the well-known rules in *MacNaughten's Case*, and of subsequent judicial decisions, the knowledge test, rather than the power of control test, seems to be the criterion mainly relied upon. There is clearly, therefore, considerable difference of opinion amongst judges, as to whether the bracketed portions of Stephen's article represent the law. It is possible that this tendency of the law towards the knowledge test, rather than to the power of control test, is due to

¹ Cf. with this, draft of Homicidal Law Amendment Bill, section 24 (1874), and Report Criminal Code Bill (1879). In the former the power of control test was stated simply, without qualification. In the latter it was left out altogether.

the assumption that the power of voluntary action is affected mainly through the intellect, and not through the emotions, and it has been aptly suggested that it is partly a relict of the old metaphysical notion of the will, whose freedom is only limited by its intelligence.¹ The fact is, that medical science has outstripped the view taken of insanity by the judges in 1843. And just as many a clergyman to-day finds himself out of touch with the Calvinistic theories embodied in the Thirty-nine Articles, so does the lawyer, who has acquainted himself with the latest results of scientific research, find that the formulæ of the answers of the judges do not harmonise with the modern scientific ideas relating to the responsibility of the insane. The light which the last fifty years have thrown upon the obscure phenomena of insanity (even taking into consideration the tendency of some physicians to overrate its importance), shows very clearly the unscientific and highly inadequate criterion of responsibility theoretically, at any rate, accepted at the present day.

At the present time, then, the question whether an accused person is insane, so as not to be responsible according to law at the time of the commission of the offence, is decided by the Courts by reference to rules embodied in answers returned by the judges to certain questions submitted to them by the House of Lords in 1843.

Originally, only persons who were permanently and completely insane (presumably idiots and wholly demented folk) were considered outside the scope of the law. The practice seems to have been for the jury to bring in a special verdict of "Guilty, but mad at the time the crime was committed." On this verdict offenders were granted a pardon, to which in time they were considered to be entitled. Coke, in his *Institutes* (1625), while deprecating the execution of madmen as inhuman, seems to recognise as mad only

¹ *Vide* Article *Insanity*, *Encyclopædia Britannica*.

idiots, those who from nativity were *non compos mentis*, and lunatics with occasional gleams of reason (*aliquando lucidis intervallis*).

It was not until about the time of Sir Matthew Hale that "a partial insanity" was recognized as distinct from total insanity, but Hale would not have the partial insanity recognized at law. He says that "such a person as labouring under melancholy distempers hath yet ordinarily as great understanding as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony."

The weakness of this distinction has been tersely exposed by Stephen. "No state of mind," he says, "is more unlike than a healthy boy of fourteen and the man labouring under melancholy distemper. One is healthy immaturity, the other diseased maturity."¹

Later on this term "partial insanity" bore two meanings. It was used to designate—

- (1) *Intermittent insanity*;
- (2) *Monomania* (insanity with delusion).²

Absurd as this rule of Hale's may seem, it was at any rate some attempt to recognize the possibility of degrees of madness, and therefore marks a step in the history of criminal responsibility. Many years were to elapse, however, before it found favour in Courts of Law, for in 1723—the date of the trial of Arnold³—we find ourselves once more confronted by the total insanity theory. It was here that Mr. Justice Tracy said, "A prisoner in order to be acquitted on the ground of insanity must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, a brute or a wild beast." But, in addition to this mysterious and oft-quoted reference

¹ *History of Criminal Law*, Vol. II, p. 150.

² (*Vide* debate in House of Lords on *MacNaughten's Case*, illustrating this double meaning.)

³ *Arnold's Case*, 16 State Trials, 695.

to a strangely assorted trinity, the presiding judge laid down a certain proposition which foreshadowed modern legal opinion. He told the jury that the prisoner must be "able to distinguish between *good* and *evil*, and that if he could not do this, he could not be guilty of any offence." It may be noted here in passing that the differences which have always existed between civil and criminal liability were particularly conspicuous at this time. A man who was partially insane was recognized by the law as unfit to take care of himself, and his acts were voided. But he was held responsible for all criminal acts, unless totally deprived of reason.

Ferrer's Case (1766)¹ in which the prisoner had planned and executed a murder with much deliberation, seems decided on the same line of reasoning. Ferrer suffered from delusion and committed the crime under the influence of the delusion (principally of persecution). He was convicted.

The *Commentaries of Blackstone* (1765),² and possibly, as a modern writer has suggested,³ the greater attention drawn to insanity by the affliction of George III, produced a more lenient view upon the subject. Smollett, who wrote about the same time as Blackstone, defends in his *History of England*⁴ the decision in *Ferrer's Case*, and argues that, even assuming the prisoner to be insane, such cases were best subjected to the full rigour of the law. Blackstone, however, is of a different opinion. He quotes with approval Coke's dictum as to the cruelty and uselessness of executing madmen. If a man of sound memory, says he, commit a capital offence and become mad, he ought not to be arraigned at all. He further condemns 33 Hen. VIII, cap. 20, decreeing that if a person committed high treason and afterwards should "fall to madness," he should notwithstanding "suffer execution."

¹ 19 Howell's *State Trials*, 1886. ² Blackstone's *Commentaries*, Vol. IV, p. 24.

³ *The Insane and the Law* (1895), p. 174.

⁴ Vol. V, pp. 198—208, cited by Dr. Orange in *Dictionary of Psychological Medicine*, Hack Tuke.

We now come to *Hadfield's Case* (1800),¹ where the humaner notions to which reference has been made clearly show themselves. This case, however, seems to stand by itself, and the law as laid down by Lord Kenyon can in no way be reconciled with the criterion of responsibility adopted before or after. Lord Kenyon, who stopped the case before Erskine had completed his famous defence, told the jury, "The material part of a case is whether at the very time when the act is committed the man's mind was sane. His sanity must be made out to the satisfaction of a moral man, yet if the scales hang anything like even, throwing in a certain amount of mercy to the party."

Hadfield's acquittal has been imputed largely to the eloquence of his advocate, but even apart from this the remarkable statement of Lord Kenyon would probably have been sufficient to have brought it about. Not only did he ignore the "partial insanity" test favoured by Hale, but also ignored the rough knowledge test which Mr. Justice Tracy had formulated.² The test which, in short, he proposes is whether the average moral man would consider that the prisoner was insane at the time when he committed the offence. Apparently no attempt was made to define the nature of the insanity. The evidence clearly showed that Hadfield was fully aware of the legal consequences of his action, since the object with which he did it was that he might be put to death. He acted apparently under the delusion that Heaven wished him to attempt the life of George III, though apart from his delusion evidence was given that he could talk and behave rationally on many subjects.

In 1812 the cases of Bellingham and Bowler,³ which

¹ 27 Howell's *State Trials*, 1313.

² *Vide ante*, p. 78.

³ Bellingham clearly was unable to appreciate the moral quality of his action, for he strenuously maintained that his grievance (*i. e.*, a denial of justice by the Government) had justified his act. He knew that the act was a wrongful one ("abhorrent" he calls it) and an illegal one, but considered that the special circumstances exonerated him.

closely followed one another, showed that *Hadfield's Case*, so far from constituting a precedent, had only resulted in a reaction. The prisoner Bellingham, who from the evidence seems to have suffered from insane delusions, was tried and executed for the murder of Mr. Spencer Perceval.¹ In his summing up Sir James Mansfield said, "There is a species of insanity where people take particular fancies into their heads, who are sane upon all other subjects, but this is not a species of insanity which can excuse any person who has committed a crime, unless it so affects his mind *at the particular period* when he commits the act as to *disable* him from distinguishing between *good and evil*, or to judge of the consequences of his action." Here we have the present legal criterion of insanity insisted upon once more, *not*, Was the man insane when he committed the act? (*vide* *Hadfield*) but, Was his insanity such that he could not distinguish between right and wrong in the abstract? For (as Lord Mansfield says in another part of his summing-up) "If such a person were capable in other respects of distinguishing right and wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement." This is another step in the legal history of responsibility; that is, if we put *Hadfield's Case* by itself. In *Bowler's Case* there is no very satisfactory evidence that any insanity existed, and the chief thing to note is, that the test of knowledge of right and wrong in the abstract is again recapitulated with reference to the act in question.

The case of Oxford² in 1840 marks another step forward.

¹ Cited *Collinson on Lunacy*, 636, 673 (note); *vide* also *Times*, May 16th and July 4th.

² *Times*, July 12th, 1840.—Bowler had what is called the epileptic neurosis, and it was proved that a week after the murder he had a fit. The connection between the epilepsy and the homicidal act does not seem very strong (judging from the report), and scarcely justifies the assumption that he was suffering from impulsive insanity, the outcome of epilepsy. For comments on epilepsy and insanity, see *post*.

In the summing-up of Lord Denman occurs this statement:—"The question was," said his Lordship, "whether the prisoner was insane at the time the act was done," and by insanity Lord Denman meant a disease in the mind, as of a person quite incapable of distinguishing right from wrong, . . . "that species of insanity that satisfies you that he was quite unaware of the nature, character, and consequences of the act which he was committing, and was really unconscious at the time that he was committing the act, that it was a crime." The emphasis here no longer appears to be laid upon knowledge of right and wrong in the abstract, but refers for the *first* time, it is suggested, to the *knowledge* of the *rightness or wrongness* of the *particular act*. In fact, Lord Denman's summing up was practically adopted in the answers of the judges in *MacNaughten's Case*.¹

Like all the previous cases recorded, *MacNaughten's Case* (1843) was a case of insanity with delusion. Mr. Cockburn boldly urged the "partial insanity"² of the prisoner as a defence for the murder he had committed, and this plea of partial insanity met with no repudiation from the Bench, and was practically admitted by the judges in their subsequent replies to the questions put by the House of Lords.³ These questions need not be given here in detail; it will be sufficient to note the points established by the answers.

1. With reference to the inquiry as to how the question of the prisoner's state of mind ought to be left to the jury, it is stated, "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved, and to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defective reason or disease of

¹ 10 *Clark and Finnelly's Rep.* 200.

² Meaning here not intermittent insanity, but monomania.

³ *Vide*, p. 77.

the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong."

2. The answers only deal with those cases of insanity which are accompanied by delusion. If under the influence of an insane delusion a person does an act with the view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to the law of the land.

This, which is in substance the first answer, must be read in conjunction with Answer IV.

Further, the way in which the delusion affects the responsibility of the prisoner is carefully explained as follows:¹—

The effect of the first statement seems to be that no matter how far morally justified the agent may think himself to be, if he commit an act which to his knowledge is punishable at law, then he is accounted responsible. Which is tantamount to saying that the test of responsibility in such cases of delusion is a knowledge of legal consequences; and although every man is presumed to be cognisant of the law, yet if by reason of insane delusion a man's knowledge is so clouded that he is ignorant of legal consequences, then he is not a responsible agent.

How far such a test—knowledge as to legal consequences—is fair in cases of delusional insanity, has been noted above and will be discussed later. Lord Brougham

¹ Answer IV.

"If a person under an insane delusion as to existing facts commits an offence, then, if he is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real. For example, if under the influence of delusion he supposes another man to be in the act of attempting to take his life, and he kills that man in self defence, he will be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

strongly supported it, and certainly, according to that rule, neither MacNaughten nor Hadfield ought to have been acquitted.

But it is difficult to reconcile this statement with the one so elaborately set forth in Answers II and III. How can the following sentences be reconciled with the *legal* knowledge test.

"It must be clearly proved that at the time of committing the act the party
"accused was labouring under such a defect of reason as not to know the *nature*
"and *quality* of the act he was doing, or if he did know it, that he did not know
"he was doing what was *wrong*."

"If the accused was conscious that the act was one which he *ought* not to do,
"and *if* that act was at the same time contrary to the law of the land, he is
"punishable."

By nature and quality the present writer understands the kind of act it was, *e.g.*, shooting with a loaded pistol at another person, and the penalty attached by law to such an act; *e.g.*, hanging or imprisonment, as the case may be. If the person did know this, then in order to be exempted from liability it must be proved that he did not know he was doing what was (morally) wrong. And if it be objected that it should be understood as legally wrong, then how explain the emphatic phrase in the second sentence, the act was one "which he ought not to do;" surely this can only refer to moral obligation. It is submitted that the natural construction to be placed upon this sentence is, that if the accused knew he was doing an act which was morally reprehensible, and if at the same time the particular act happened to be illegal (not, it should be noted, if he was conscious that it was illegal), then he is punishable.

The test of moral right from wrong is surely enunciated here. If so, the acquittals of Hadfield and MacNaughten are comprehensible.

How Answers II and III and Answers I and IV can be reconciled is hard to see. Answer I, moreover, so obviously

deals with men of MacNaughten's stamp. The only theory which may possibly explain the change of test in the subsequent answers is, that Answer I deals with delusions of a certain specific character, *i. e.*, "of redressing or revenging some supposed grievance, etc." It may have been thought that delusions of this kind were so dangerous to the State that it would be undesirable for men who held them to be accounted irresponsible merely because they believed their acts to be morally justifiable. The outcry after MacNaughten's acquittal had, maybe, something to do with the more drastic framing of this answer.

The separate answers of Mr. Justice Maule amount to very little more than the application of the knowledge of legal right from wrong test (and his Lordship clearly implies *moral* right and wrong) to all cases of insanity. There was possibly more wisdom in the vague, evasive replies of Mr. Justice Maule than the explicit but scarcely self-consistent replies of the fourteen other judges.

How far these replies are in accordance with the best medical opinion of to-day; how far they need modification; these and other questions arising out of the subject will be considered in the following portion of this article.

(To be continued.)

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

The First Case before the Hague Tribunal.

THE United States can claim the credit of setting in motion the machinery of the permanent international tribunal at the Hague which has been waiting in readiness these last two years; and the question raised between them and Mexico is peculiarly fitted by its legal and non-political character for submission to such a Court, namely, the

mutual obligations of these States with regard to a yearly endowment granted to the Church of California by the Mexican Government when sovereign of California, which on the annexation of California to the United States both governments declined to continue. The decision of the Court in favour of the United States awarding a lump sum of one and a-half million dollars; and a further yearly payment of eight thousand dollars by Mexico, has been delivered with satisfactory despatch; and it is to be hoped that this beginning will encourage other parties to international disputes arising on the construction of treaties and State obligations—at any rate, if not involving territorial considerations or national honour—to resort to the same Court. It has already been pointed out in these pages that special or general arbitration treaties between particular nations providing for special tribunals and procedure need not be at all disadvantageous to the permanent optional system established at the Hague, but are rather more likely to make resort to it familiar to the signatories of the Hague Convention. Certain questions raising rather political than legal considerations will, however, for the present probably be dealt with by special procedure; and the latest example is the agreement between Japan and France, Germany and Great Britain, to submit to arbitration the question of taxation of buildings within the European settlements at Yokohama and elsewhere, for which the Court is to consist of one arbitrator named by Japan, another named by the three European Governments, and a third by those two persons, or failing their agreement by the King of Norway and Sweden.

The new Franco-Siamese Treaty.

The effect of the agreement between France and Siam, just announced by the French Foreign Minister, is practically to make Siam a party to the Anglo-French agreement of

1896 so far as recognition of the Mekong basin as the French sphere of influence is concerned (see these Notes, Vol. XXVII, p. 330). Under it France acquires a considerable stretch of territory on the right bank of the Mekong, which was conquered by the Siamese from the Laos and Cambodia, in return for the evacuation of Chentabun; the removal of the restriction in the treaty of 1893 against keeping troops within a certain distance of the Mekong provided that such troops are officered and composed of Siamese only, and that for any construction of works in the Mekong basin, which Siamese capital and *personnel* cannot perform, the preference shall be given to French contractors; and lastly, the limitation of the status of French subjects for the purposes of consular jurisdiction, to persons born in French territory or protectorates and their children. Conformably with the Anglo-French agreement, France obtains no differential commercial privileges in the Siamese part of the Mekong Valley, It will have been worth the while of the Siamese Government to make these large concessions if Siam obtains an Eastern frontier, which can be regarded as definitely assured to her; and it is to be hoped that the wording of the treaty, and the spirit in which it is observed, will prevent any such questions arising as destroyed the efficacy of the former treaty between Siam and France.

Central American Hostilities.

The political unrest in the Republics of Central and Southern America which by its regular outbreaks has come to be almost the normal condition of things there, is no longer regarded by other States as affecting the commercial rights of their subjects in anything like the same degree as hostilities elsewhere; and the belligerent measures, whether of governments or insurgent organisations, are

restricted to as narrow limits as possible. Thus the United States have recently refused to recognise the blockade by the Haytian Government of posts held by the Firminist revolutionists, on the ground of its non-effectiveness, following the precedent set by Mr. Seward in 1885 on similar action by the Columbian government; and Great Britain, Germany, and France have taken a similar course with regard to similar recent action by Columbia. The bombardment of Ciudad Bolivar by Venezuelan men-of-war, an unfortified town held by revolutionist forces, has led to a request by the British subjects resident there to our government to protect them; and American naval and military forces have been keeping open the railway across the Isthmus at Colon in spite of the fighting going on in the vicinity. The question of the right of a government to use neutral property equally with that of its citizens for the service of the State, whether against foreign or domestic enemies, has also been raised by the claim of the Columbian Government to use the vessels of a British shipping company for transporting its troops, as indeed by an existing contract the company was bound to do if required; and the company's refusal to do so, and thus be drawn into the struggle, has been upheld by the despatch of a British gunboat to protect British interests. The case of the Netherlands Railway in the South African war has shown that the existence of such a contract may not be enough to protect a neutral from the consequences of unneutral conduct in seeming to support the belligerent. Leaving out of account Municipal law, by International law this last case would strictly fall within the *jus angariae*, of which illustrations were afforded by the Franco-German war, such as the seizure by the German authorities of railway carriages and stock belonging to neutral subjects, and the sinking of English vessels in the Seine near Rouen by the German military commander there, in order to prevent French men-of-war cutting the communications

between the German forces North and South of the river. In this case compensation was admitted by the German Government to be due. (Hall, 766.) Civil commotion is in strictness not considered to entail any liability on the government within whose jurisdiction it takes place, for any losses received by foreign subjects in the course of the struggle; but in practice now compensation is always made in such cases, on the principle of mitigating a constitutional or belligerent right of an unusual nature by compensation for its exercise, like pre-emption in cases of seizure of what is not usually contraband. It is worth noting in this connection, that the High Court at Pretoria has recently (Sept. 4th) upheld the legality of the late Transvaal Government commandeering a horse from a resident British subject for warlike purposes during the war, and has refused to award any compensation, on the ground that it is the right and duty of the government of a State to take measures for the defence of the country, and internationally aliens are as liable as citizens to contribute for this purpose.

War Rights of Revolutionists.

The limits of the belligerent rights of revolutionists against the subjects of governments other than their own have been somewhat forcibly illustrated by the destruction (accompanied by loss of life) of the gunboat *Crête à Pierrot* belonging to the Firminist insurgents in Hayti by a German cruiser, on the ground of her piratical conduct in seizing from a German merchantman in Haytian waters munitions of war intended for the forces of the Haytian Government. The rule observed in practice with regard to piratical acts (*i. e.*, done without commission from a recognised government) committed for political ends against a particular State is, that other nations do not interfere to prevent them, especially when committed in civil war, unless they lead to

acts of violence against ships of other States, in which case they can take measures to protect their own subjects. Hall cites (276) in illustration of this principle the course followed by England, France, and Germany in 1873, when the Spanish Fleet at Carthagena was seized by insurgents who were declared pirates by the Spanish Government: namely, directing their men-of-war to allow freedom of action to the insurgent ships so long as they did not threaten the lives and property of their respective subjects, and to hand over persons or property captured to the Spanish Government. The case of the *Huascar* in 1877 (Hall, 277), a Peruvian warship, seized by insurgents at Callao, is very similar to the present one. The vessel put to sea to meet the insurgent leaders at Iquique, took a supply of coal from a British steamer without payment, and stopped another and took out of her two Peruvian officers. The Peruvian Government disclaimed any responsibility for her actions; and the admiral of the British squadron in those waters, on the ground that the *Huascar* was acting piratically against British ships and property, fought an action with her, from which she escaped only to surrender to Peruvian men-of-war. Owing to the popular feeling in Peru, the Peruvian Government demanded satisfaction, but the British Government refused it, upholding the action of the admiral, and the claim was dropped. The case cannot, however, be regarded as a safe general precedent; the use of force should only be permitted to the extent of preventing the hostile acts being repeated against neutral property. A proof that detention is an equally effective, if quieter, method of protecting neutral rights is afforded by the recent action of the French cruiser *Suchet* against a Venezuelan cruiser, in order to obtain the release of some French subjects, imprisoned by the Venezuelan Government for refusing to pay a second time taxes which they had paid already to the revolutionary authorities. An insurgent

organisation in a State cannot be prohibited from belligerent measures (without which it cannot hope to be recognised as a regular belligerent) merely because they thereby limit to some extent neutral trade with their country, but they must show good faith to avoid their actions being regarded as merely predatory; and it must be left to the judgment of the neutral States to determine how far they will recognise the validity of such measures as are properly only enforceable by a sovereign authority, viz., blockade, seizure of contraband, and the like.

The Shipping Agreements.

Rumour had credited the authors of the so-called Atlantic Shipping Trust with the intention of forming a single company to acquire the principal Atlantic shipping Lines and their fleets; and the consequent changes in the nationality of some of the largest merchant ships of the maritime nations would have had an international importance in the event of war. A proof that British public and official opinion has realised that the ownership and control of merchant shipping is a matter of national concern, is afforded by the announcement of an agreement between our Government and the Cunard Line, by which, in return for a yearly subsidy during a term of twenty years, the Line pledges itself to remain a purely British undertaking both in management and ownership of its vessels; to hold its fleet at the disposal of the Government; not to raise freights unduly or give preferential rates to foreigners; and to build ships of high speed with money lent by the Government. The particulars, however, now given of the incorporation of the so-called Trust—the International Mercantile Marine Company, registered in New Jersey with a capital of £24,000,000, of which the direction is stated to be American and British in the proportion of

six to five—show that the Trust internationally leaves things unaltered. The Company embraces and controls some of the leading Atlantic lines in Great Britain and the United States, and has an agreement with the chief German and other foreign shipping lines for their mutual relations and spheres of action, including an uniform scale of freights and charges, and a proportional community in their profits. The Trust undertakes with our Government that the component British companies of the combination will not be absorbed in the controlling company, but will retain their present nationality; their direction will be controlled by British subjects; and the ships will sail under the British flag, carry British officers, and be manned in reasonable proportions by British crews. In case of war between any of the Governments whose subjects are concerned in the combine, the position of each party to the agreement will be determined by their present nationality. No question, therefore, as to the national status of these companies and their ships can arise either in prize courts or municipal courts. Under our present law, the fact that a large part of the shares in such companies or their ships is held by foreigners, does not prevent the registration of their ships as British, or impose on them as shipowners the penalties attaching to unqualified ownership of British ships; and our law, in looking to the corporation and not to its members to determine the character of the owner, only does what the French, German, Italian, and Dutch systems also do. If our Government can thus secure by contract with two such important shipping organisations terms which will make British ships more national in control and equipment, something like the advantages of the old Navigation Act will have been obtained, without alteration in the more flexible system under which British shipping has increased to its present proportions.

G. G. P.

IX.—NOTES ON RECENT CASES (ENGLISH).

IN the issue of this Magazine for February last some comments appeared in this column (at p. 228) on the decision of Kekewich, J., in *In re Wood, Wood v. Wood* (L. R. [1901], 2 Ch. 578). We there expressed a hope that there would be an appeal, and a confident belief that if there was an appeal the decision would be reversed. It was pointed out that while *In re Standley's Estate* (L. R. [1868], 5 Eq. 303), upon which the learned judge relied, was unquestionably in point, that decision was prior to the judgment of the House of Lords in *Hill v. Crook* (L. R. [1873], 6 H. L. 265), and inconsistent with the principles laid down therein, and further, that Stirling, J., in *In re Deakin* (L. R. [1894], 3 Ch. 565), had refused to be bound by it.

In re Wood, Wood v. Wood (*supra*) has now been appealed, and the Court of Appeal has unanimously reversed the decision of Kekewich, J. (L. J. [1902], 71 Ch. 723). Vaughan Williams, L.J., seemed to think that the judgment of the Court of Appeal would carry the law further than it had hitherto gone, as to recognising the obvious intentions of the testator, but he concurred in it. Romer, L.J., and Stirling, L.J., had no doubts but that, on the principles of interpretation observed by the Courts ever since *Hill v. Crook* (*supra*), the appeal must be allowed. There was no express reference in any of the judgments to *In re Standley's Estate* (*supra*), which was still relied upon by the respondents to the appeal; and the only indirect reference to it was in the strongly worded statements of both Romer and Stirling, L.JJ., that if it clearly appeared from the will that it was the intention of the testator to treat his illegitimate children as if they were legitimate, there was nothing to prevent his doing so. This may be taken as a final repudiation of the dictum of Wood, V.C., in *In re Standley's Estate* (*supra*), which we cited and questioned in our former comments.

In re Kingdon and Wilson (L. R. [1902], 2 Ch. 242) is a decision of great practical importance, overruling as it does the very unfortunate decision of a Divisional Court of the Queen's Bench in *In re Lamb* (L. R. [1889], 23 Q. B. D. 5). The question was whether, when a solicitor makes a payment of estate duty on behalf of a client, such payment is made by him merely as agent of the client, or is a "disbursement" by him within s. 37 of the Solicitors Act, 1843, and as such to be included in his bill of costs. The point is of importance owing to the rule that a client who has his solicitor's bill of costs taxed is not entitled to the costs of taxation unless the result of the taxation is to reduce the amount of the solicitor's bill by at least one-sixth. If a payment of estate duty can properly be included in the bill of costs, the solicitor may usually grossly overcharge for the work done by him, and the taxing master may greatly reduce the amount charged for such work, and yet, as the amount paid for estate duty cannot be reduced, the client may have to pay the costs of taxation. Thus, for example, a solicitor pays out of money provided by his client £1,000 estate duty. He charges for work done, £300. The client demands taxation, and the sum of £300 is reduced by half. Here is a case of gross overcharge; but if the £1,000 is considered a disbursement then the £150 taxed off not being one-sixth part of the whole bill (£1,300), the client has to pay the costs of taxation—that is, pay for preventing an officer of the Court grossly overcharging him.

The old rule, recognized in *In re Remnant* ([1849], 11 Beav. 603), was, that payments of such duties as estate duty were not to be considered disbursements. That rule was overturned by *In re Lamb* (*supra*). Many solicitors, however, refused to take advantage of this decision, which they felt was unjust to clients, and was due to the learned judges who gave it not being familiar with Chancery practice. The Court of Appeal has now, in *In re Kingdon and Wilson* (*supra*), restored the old practice.

Van Praagh v. Everidge (L. R. [1902], 2 Ch. 266) will, if it is sustained, settle two points upon which there is no express authority. The first is, that a bidder at an auction cannot, after his bid is accepted, withdraw the authority of the auctioneer to sign the necessary memorandum on his behalf, although he attempts to do so immediately after the property is knocked down. No doubt this seems reasonable. As said by Stirling, J., in *Bell v. Balls* (L. R. [1897], 1 Ch. 663, at p. 672), judges will always be reluctant, on property being knocked down at an auction, to allow the vendor or purchaser to say, "I am not satisfied with the price and withdraw the authority given to the auctioneer." This reluctance may be justified on principle, too, on the ground that the authority given to the auctioneer is to sell, and on a bid being accepted the sale is complete, and the signing is merely recording the transaction. The second point decided in *Van Praagh v. Everidge* (*supra*), though it seemed to give little trouble to the learned judge, is more doubtful. It is this: where through his own negligence a person mistaking the property being offered for sale for an altogether different property bids for it and his bid is accepted, the contract of sale is complete and binding on the bidder. There are no doubt many grounds of convenience in favour of this decision. It is difficult, however, to see on what principle it can be sustained. To make a contract of sale at all there must be an intention to sell property on the one side, and an intention to buy the same property on the other. Here the vendor intended to sell one property while the purchaser intended to buy another. *Tamplin v. James* (L. R. [1880], 15 Ch. D. 215), which Kekewich, J., relied upon, is not in point. There the defendant bid for the property he intended to buy, but through his own negligence thought it was of larger extent than it actually was. In *Van Praagh v. Everidge* (*supra*) there was a complete

mistake as to the subject-matter of the transaction. No doubt, in such a case, any delay in repudiating the bargain would reasonably be regarded as waiving the mistake, or as raising so much doubt as to whether it was a case of mistake and not of afterthought, that the Court might refuse to give relief. But here the repudiation was immediate—before the auctioneer had signed the memorandum on behalf of the purchaser—and so, if the decision is correct, it must be taken to be the law that a man by momentary negligence may buy property he never had the least intention of buying.

The decision of the Court of Appeal in *In re Holland, Gregg v. Holland* (L. R. [1902], 2 Ch. 360), reversing Farwell, J. (L. R. [1901], 2 Ch. 145), brings the law back to common sense on two points. In the first place, it decides that the fact that the life interest reserved to the settlor under a voluntary settlement is subject to a condition of forfeiture on the bankruptcy of the settlor, is not in itself sufficient to make the whole settlement void, as being for the purpose of delaying or defeating the settlor's creditors within 13 Eliz., c. 5. The opposite was laid down in *In re Pearson* (L. R. [1876], 3 Ch. D 807), which Farwell, J., felt bound to follow. To what absurd results the rule in *In re Pearson* (*supra*) leads appears from the case of *In re Holland* (*supra*) itself. Farwell, J., there felt bound to hold that a post-nuptial settlement by a husband of a reversionary interest in property to which he was entitled in right of his wife, upon the wife for life, afterwards upon the husband for life or until he became bankrupt, and on his death or bankruptcy to the children of the husband and wife, was altogether void, although there was not a trace of evidence that the husband, in fact, had any intention of delaying or defrauding his creditors, or indeed that at the date of the settlement he had any creditors to delay or defraud. The

settlement here made was about as proper a one as could be suggested, and one which the Court very probably would have compelled him to make if application had been made by the wife in respect of her equity to a settlement. The second point decided by the case is, that the recital in a post-nuptial settlement of a pre-nuptial verbal agreement, to execute in consideration of marriage the settlement in question, is a note or memorandum of such pre-nuptial agreement sufficient to satisfy sect. 4 of the Statute of Frauds. Why it should not be is difficult to understand, but still authority was so divided on the point as almost to justify the view of Farwell, J., that the balance of it was against the sufficiency of such a recital. Considering what has been held a sufficient memorandum with regard to other contracts coming within sect. 4, it is amazing to find this difficulty made as to agreements in consideration of marriage. The only explanation that occurs is, that there was some confusion in the minds of some of the judges between an agreement and evidence of an agreement. When most of the decisions were given, an agreement between husband and wife after marriage was, of course, invalid, but neither the Statute of Frauds nor the subsequent marriage made a verbal agreement made between the spouses before marriage invalid. It was valid provided it was evidenced by a memorandum of it signed by the husband, and such memorandum might be made and signed by the husband just as well after as before marriage.

We have often heard of actions against solicitors for gross negligence: do actions also lie for over diligence? We suppose not, and yet occasionally the zeal of a solicitor on his client's behalf exposes such client to trouble and damage which otherwise he should escape. The case of *Jared v. Clements* (L. R. [1902], 2 Ch. 399) is proof of this. There

the defendant, having agreed to buy certain property from one Taylor—who had had a receiving order in bankruptcy made against him which was afterwards rescinded—his solicitors carefully searched the file in bankruptcy, and discovered there that there was or had been an equitable mortgage of the property agreed to be purchased. By means of a receipt, forged by Taylor's solicitor, they were induced to believe that this mortgage was paid off, and the purchase was completed. But the mortgage was not paid off, and Byrne, J., has now held that while if the plaintiff's solicitors had never discovered the existence of the mortgage the legal estate which was conveyed to the defendant would have protected him against the equitable mortgage, yet having had such notice it was no protection.

Gavelkind, or the Common law of the county of Kent as it is sometimes called, is the oldest part of English land law. It is generally regarded as a survival of the Saxon law which prevailed before the Conquest and the subsequent feudalization of English law. It is therefore very strange that till *In re Chenoweth, Ward v. Dwelley* (L. R. [1902], 2 Ch. 488), there has been no decision as to whether the custom of descent in coparcenay among males which admittedly marks Gavelkind as far as the nearer relatives are concerned, extends to all relatives of the tenant. In that case Farwell, J., has held that it does, and the decision seems in accordance with the views of all the more authoritative text writers.

J. A. S.

In *Farquharson Brothers & Co. v. King & Co.* ([1902], A. C. 325; 86 L. T. R. 810; 71 L. J. R. 667), a well-known rule of law, as stated in a well-known case, has been subjected to some criticism on its verbal expression. "Wherever," said

Ashhurst, J., in *Lickbarrow v. Mason*, "one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This is obviously open to a wide application, and the House of Lords has now restricted the interpretation given to the rule when *Farquharson Brothers & Co. v. King & Co.* was before the Court of Appeal ([1901], 2 K. B. 697; 85 L. T. R. 264; 70 L. J. R. 985). This restriction was not altogether unexpected. The case arose out of an ingenious fraud of a clerk to a firm of timber merchants, the appellants, who had authorized him to make certain sales of timber lying in the Docks to old customers of the firm, and had requested the Dock Company to act upon the ordinary transfer and delivery orders when signed by him. He was thus "enabled" to transfer into a fictitious name in the Dock Company's books some of his employers' goods, which in that name he sold to the respondents, who bought in good faith and without suspicion that he had any relation to the appellants' firm, to whom they were strangers, or that the name under which he dealt was an assumed one. On the discovery of the fraud, the appellants brought an action for the timber or its value, and were successful on the question, "whether the Plaintiffs had so acted as to hold the clerk out to the Defendants as their agent to sell timber to the Defendants," which was the sole one submitted to the jury by Mathew, J., who refused to put the question, "whether the Plaintiffs had by their conduct, enabled the clerk to hold himself out as the true owner, or as entitled to dispose of the goods." The Court of Appeal held that this rejected question ought to have been put, and that there was "no doubt it ought to be answered in the affirmative." Judgment was accordingly entered for the respondents, but this order has been reversed by the House of Lords, who have restored the judgment of Mathew, J., in favour of the appellants. Lord Lindley stated that if the word "enable"

is used in the wide sense given to it in the Court of Appeal, the rule as expressed by Ashhurst, J., in *Lickbarrow v. Mason* is "clearly untrue."

Ashhurst, J., never meant his *dictum* in *Lickbarrow v. Mason* to rank as an exhaustive definition. "A broad general principle" is what he called it (p. 60, 2 T. R.). As it is one of the encroachments on the Common law maxim, *Nemo dat qui non habet*, and is quoted frequently, it is well that its vagueness has been judicially noticed. Both the maxim and the modifying rule are the foundation of sect. 21 of the Sale of Goods Act 1893, which enacts that where goods are sold without the authority of the owner, the buyer acquires no better title to them than the seller had, unless the owner is by his conduct precluded from denying the seller's authority to sell. The larger ground of preclusion is that which is provided for by sect. 2 of the Factors Act 1889, which is to the effect that where a mercantile agent acting in the ordinary course of business as such sells goods of which he is, with the consent of the owner, in possession, such a sale is as valid as if it had been expressly authorised by the owner. A lesser ground is where an owner holds out as authorised to deal with his property a person not coming within the Factors Act; but in Lord Lindley's words, which are clearer than those of Parke, J., whom he cites, "the holding out must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it." In *Farquharson Brothers & Co. v. King & Co.* the clerk was not a mercantile agent, and there was no holding out to the respondents, for they bought from him under the belief that he was somebody else and, as far as the evidence shows, had no knowledge of the existence even of the appellants.

Lord Halsbury ascribes the *dictum* to an American judge. It is true it was put forth, with a verbal variation, in an American case, but that was more than 40 years after *Lickbarrow v. Mason*.

When of two or more persons charged in a joint indictment with conspiracy (it not being alleged that there were any other or unknown parties to the conspiracy), one pleads guilty, and the others after trial are acquitted, what is to be done with the prisoner? It seems strange that, after the criminal law has been administered for centuries, this question on such a simple combination of circumstances in an offence of frequent occurrence, should have stood over for solution till to-day. Yet in *The King v. Plummer* ([1902], 2 K. B. 339; 86 L. T. R. 836; 71 L. J. R. 805), it was submitted to the Court of Crown Cases Reserved, and settled by five judges, though two of them felt, even after argument, "considerable difficulty" in the matter, and apparently concurred in the decision only because they were "unable to answer the very learned and able judgments which have been delivered by Wright and Bruce, JJ." The precedents examined show, beyond the point which the Court had to decide, that, if all the accused had pleaded not guilty and the appellant only had been convicted, no judgment could have been passed, for there could have been no agreement between him and the others if there was none between them and him. This well-known effect seems to have been settled so long ago as 1410, or perhaps earlier. But if the appellant had been arraigned and tried alone, judgment could have been pronounced against him on conviction. This effect is also well-known. But beyond this point doubts arise. For instance, in the case just assumed of a separate trial, if the appellant had been tried first and convicted, and the others had been subsequently

tried and acquitted, it is not clearly settled whether the effect of the previous conviction of the appellant would be avoided. In *Rex v. Cooke*, Lord Littledale thought it would be; but in *Russell on Crimes* a different view is taken. So far, the assumption has been that all the accused had pleaded not guilty. But dealing with the actual fact of the pleading, if the appellant had been sentenced immediately on declaring himself guilty, the sentence would have been so far right. But again doubt arises, for it is not certain whether the sentence would not be vacated upon the acquittal of the other defendants. Upon all these uncertain points a sound opinion can be given, but they must remain nominally uncertain till they come up some day in practice.

But as it is clear that no man can be punished for a crime that does not exist, the Court of course quashed the conviction. This they did in a great measure upon the consideration of the inconsistency which would otherwise have been apparent on the record; but they were also of opinion that, apart from strict law, they could have dealt with the case under the powers of 11 & 12 Vict., c. 78 (2). The question in this case and the solution of it were conjectured as long ago as 1859 by Cockburn, C. J., in *Robinson v. Robinson*, 1 Sw. & Tr. 362, and in *Chitty's Criminal Law*.

T. J. B.

SCOTCH CASES.

In our May issue (*ante*, p. 358) we ventured to suggest that the case of *Castaneda v. The Clydebank Shipbuilding Company* savoured rather of red tape than of sound International law. It is therefore with some satisfaction that we now notice its reversal by the House of Lords (10 Sc. L. Times Rep. 237). The Lord Chancellor, who gave the leading opinion, stated that the case did not involve any peculiarity of the law of Scotland, and was simply con-

cerned with the question whether the right party was suing. The King of Spain might or might not have the ultimate interest, but the contracting party was the Spanish Minister of Marine, and as he had brought the action it was impossible to say that there was no right in him to sue.

We have a vivid recollection of the sensation created many years ago by an article in a London daily, headed "A Night in a Workhouse by an Amateur Casual." A brilliant writer had donned the garb of a street wail, applied for a night's lodging, submitted to a bath in water of pea-soup complexion, conversed and slept with the other casuals, and afterwards described their methods and reproduced much of their conversation. This piece of realism in literary art has been recently emulated in Scotland (*M'Kechie v. Blackwood & Sons*, 11th July, 1902, 10 Sc. L. Times Rep. 191). A contributor to *Blackwood's Magazine*, with a view to study the manners and customs of the Fife miners, assumed their dress, obtained employment in a mine, worked as a miner, and lodged with a miner's family in the village of Kelty. He then wrote a series of interesting and entertaining articles, entitled "Among the Fife Miners," which his experiences enabled him to enrich with many details of their private domestic life. Unfortunately for the author and the magazine the miners are not casuals, and the domestic life was so portrayed as to point conclusively to the home where the author lodged. A particular incident affecting a daughter of the house is narrated in detail, after which follow the author's reflections in these words: "Now this might be called 'indelicate.' Delicacy, however, is a standard of the more complex world, and this girl knew naught of it." The girl and her father have now raised action in the Supreme Court against the proprietors of the magazine, alleging that the narrative is not fact but

fiction, that the reflections are offensive and insulting, and that she has in consequence been subjected to indignity and ridicule. The defenders admit in their pleadings that the pursuer is the "lassie" referred to, but contend that the statement, whether true or false, makes no charge upon which action could follow. Lord Kincairney, in allowing a proof, says: "Conceding and appreciating the good intentions of the defenders, it does not strike me as fair or delicate to lodge in a house and then detail to all the world the private lives of the inmates, at least, without using every endeavour to conceal the identity of the individuals referred to; and I nowise wonder that the pursuer should feel aggrieved at the unauthorised revelations of her private life, even if all that was said were true, but very much more if it was all untrue, or if she thought it untrue, or if it was exaggerated or coloured so as to meet the taste of the reading public."

Some of the difficulties connected with what are known as continuing contracts were illustrated by two counter actions between *Dunford & Elliot and Macleod & Co.* (19th June, 1902, 39 Sc. L. Rep. 719). *Dunford & Elliot* contracted with *Macleod & Co.* to provide steamers for the conveyance from Bilbao to Middlesborough of about 10,000 tons of iron ore from September to December, 1900, both inclusive, in about equal monthly quantities as might be mutually arranged. No steamers were supplied during September, but early in October one was notified to be ready at the port of shipment on the 20th, and another towards the close of the month. The "stemmings" thus indicated were not objected to by *Macleod & Co.*; but no steamer having arrived by 27th October, they on that date declared the contract cancelled. The first steamer arrived on the following day and the second on 30th October, but

the shippers' agents were instructed not to load. Cross actions of damages were raised by the parties in the Sheriff Court of Lanarkshire at Glasgow, in which Sheriff-substitute Guthrie found both parties to blame—the shipowners for breach of the general contract, and the shippers for refusing to load the particular vessels accepted as “stemmed” to the contract. The damages in the former case were assessed at £500 and the latter at £300, with half expenses to the shippers. On appeal, the First Division of the Court of Session adhered, the leading judgment being given by Lord M'Laren. In the course of his opinion his lordship said:—“This was a time contract, and when parties stipulate for the carriage of so many tons in each month, I think it must be taken that time is a material condition of the contract, unless the contrary is proved by the clearest evidence. . . . It does not follow that Macleod & Co. were entitled to refuse to load the two ships which had been sent to Bilbao with their approval. . . . A contracting party is not entitled to proceed so as to cause unnecessary loss to the other party without any resulting benefit to himself.”

R. B.

IRISH CASES.

X is knocked down and injured by a runaway pony and trap, which A has been driving, but which he has negligently left unattended in the street. The pony and trap are the property of B. X sues both A and B; the jury award damages against both, and also find that A was acting as the servant of B within the scope of his authority. The only evidence alleged in support of this finding is that B, the day after the occurrence, called on X's daughter, said he was very sorry that it was his pony and trap, and offered, if she took her father home from hospital, to pay expenses. Can this evidence be treated as an admission against B, and

is it sufficient to sustain the finding as to service? Thus barely stated, the question seems to admit of but one answer: but the King's Bench Division were equally divided upon it, and it was left for the Court of Appeal to hold definitely that the finding could not be supported (*Powell v. M'Glynn and Bradlaw* [1902], 2 Ir. R. 154). The principle as to admissions being evidence against their maker is tolerably plain, difficult as its application may sometimes be. Admissions made merely with a view to compromise and "to bring peace" are not evidence against the maker; but an *offer of a sum* to compromise is evidence, subject to the ordinary exceptions as to offers without prejudice. *Illidge v. Goodwin* (5 C. & P. 190) was cited as an authority for the proposition that an offer to pay money is of itself an admission of liability; but in that case the offer was clearly relevant upon a question of identity, as there were two men named Joseph Goodwin, and it was a question which was the real defendant; an offer to pay by one of them was therefore some evidence that *he* was the defendant. The Court of Appeal, in the present case, thought there was nothing to show that B's offer was made otherwise than for the sake of charity; and Fitzgibbon, L. J., quoted a comment of Dowse, B., when a similar offer was pressed as implying liability: "You might as well give the oil and the twopence in evidence against the Good Samaritan to prove that it was he who robbed the man!" The case may also be noted as emphasizing the principle, often forgotten by juries, and perhaps occasionally by judges, in running-down cases, that mere ownership of the "tort-feasant" vehicle is *per se* no evidence of liability.

In re Madden's Estate ([1902], 1 Ir. R. 63) illustrates a prerogative of the Crown in litigation—its freedom from liability for costs—which can at times become very vexatious if the Treasury, who are notoriously unsympathetic, insist

on their strict rights. The matter arose in the sale of certain lands through the Land Judge's Court, and the Crown, on this occasion, was represented by the Commissioners of Woods and Forests. Notice of the sale was served upon them, in case there might be any quit-rent claimed as payable to the Crown. They proceeded to claim the estate, on the ground that the lands had come under the Irish Act of Settlement, and had never been re-granted by the Crown. Owing to deficiencies in their ancient title-deeds, the owners had some difficulty in rebutting this claim, but succeeded at length in procuring evidence that they and their predecessors had been in possession for longer than sixty years, whereupon the Commissioners withdrew their claim, but signified their intention of not paying costs. In answer to this, the petitioners relied on the Crown Suits Act, 1855 (18 & 19 Vict., c. 90), which, they contended, placed the Crown in the same position as the subject in regard to costs incurred in litigation. It was, however, held by the Court of Appeal that the Act in question applies only to proceedings by the Attorney-General, suing in his own name on behalf of the Crown. This virtually follows the decision, now more than forty years old, in *Reg. v. Beadle* (7 E. & B. 492)—a decision arrived at with regret, and with a statement from the then Court of Queen's Bench that the law was in an unsatisfactory condition. The case is only noteworthy as pointing out a matter which seems to call for action on the part of the Legislature to remove what may in particular cases be a very real hardship upon the subject, and is a theoretically indefensible relic of prerogative. The Court has indeed power (see *Chubb's Case*, 43 L. T., N. S., 83), if it grants a favour to the Crown in the conduct of a case, to do so upon terms that the Crown shall abide the order of the Court as to costs; but this is obviously insufficient. And the hardship is all the greater, as it seems

to arise from an inconsistency between the enacting part of the Crown Suits Act and the preamble, which recites an intention to apply the Act to *all* proceedings on behalf of the Crown against any person in respect of any lands or goods, the proceeds whereof are to be carried to the Consolidated Fund; and declares that it is expedient to assimilate the law, as to the recovery of costs in such proceedings, to that in force as to proceedings between subject and subject. The enacting part, however, mentions only proceedings by the Attorney-General or the Lord Advocate.

It has been said that "pleading is now only an elegant accomplishment": and "pleading-motions" are a form of application of which counsel are growing shy. But where a plaintiff, who has instituted an action of ejectment and has been met by the simple defence of possession, proceeds in his reply to forecast a hypothetical case which the defendant may make at the trial, and to allege that he will be estopped from making such a case, that plaintiff need not be surprised if he is met by an application to have the reply struck out as embarrassing. This is virtually what happened in *Coppinger v. Norton* ([1902], 2 Ir. R. 232). The plea of possession is intended to, and does, give a defendant in ejectment the advantage of withholding until the trial the case that he intends to make: and this was a somewhat ingenious attempt to deprive him of that advantage by "forcing him out of his entrenchments" and compelling him to plead a special rejoinder. Certainly, even to a generation which knows of pleading as a science only by a sort of hearsay, and by reverential but distant study of the '68 *Bullen & Leake*, this form of contingent plea comes with some surprise. A Divisional Court struck it out as embarrassing and tending to force the defendant, in violation of his privilege under Ord. xxi, r. 21, to reveal his case in a special rejoinder. The effect of thus pleading

possession was considered in the House of Lords, in *Danford v. M'Anulty* (8 A. C. 456), where Lord Fitzgerald says (p. 465), "The defendant is not obliged to plead, in the proper sense. He puts in a statutable defence: 'I am in possession,' and the plaintiff can do nothing but take issue on it, and proceed to trial." Ordinarily, of course, an estoppel must be specially pleaded (Ord. xix, r. 16): but not in answer to a plea of possession, and especially not from the prophetic standpoint which the pleader here assumed.

Fees conditional and determinable are passing, like pleading, into the limbo of forgotten learning. But the decision in *In re M'Naul's Estate* ([1902], 1 Ir. R. 115) shows the existence in Ireland of a kind of statutory fee-simple, which may be restricted and cut down by incidents annexed to it by virtue of the statute under which it is created. Well into the nineteenth century, leases for lives, with a covenant for perpetual renewal by the insertion of a new life on the dropping of an existing one, were extensively created in Ireland. They gave a freehold interest, virtually the fee, but subject to terms, conditions, and covenants such as were usually introduced into leases. One such condition, often introduced, was a restriction upon alienation by the tenant. In the present case that restriction took the form of a covenant to pay additional rent on alienation to persons outside a specified class. In 1849, the Renewable Leasehold Conversion Act enabled either party to such a perpetual lease to enforce its conversion into a fee-farm grant, which sect. 1 provides shall be subject to such covenants, conditions, exceptions, and reservations (except covenants for renewal and covenants, &c. allowed by the Act to be commuted) "as are contained in such lease and then subsisting." Now, a covenant in restraint of alienation, contained in a fee-farm grant, is void for repugnancy to the nature of the estate, as was decided in *In Re Lunham* (1. R., 5 Eq. 170): this, however,

was not a grant under the Renewable Leasehold Conversion Act. The Court of Queen's Bench did definitely decide, in *Billing v. Welch* (I. R., 6 C. L. 88), that a covenant similar to that stated above as existing in *M'Naul's Estate* was also void for repugnancy even in a grant under the Act. That decision was more or less acquiesced in for thirty years, but had never come before the Court of Appeal. When it was brought before that Court in the present case, the Court unanimously over-ruled it, on the construction of the Act. They pointed out (per Walker, L. J., p. 133) that "there is in cases of grants, under the Renewable Leasehold Conversion Act, a *statutory* fee-simple created, with a statutory reversion to which are legally incident all covenants in the lease not commuted under the statute; and I think there is no legal justification for excluding from the grant covenants against alienation, much less such a covenant as we have to deal with here. . . . I express no opinion as to the mode in which an *absolute* covenant against alienation is to be dealt with, or how it is to be enforced."

The decision is, of course, primarily of interest only to Irish lawyers; but to them it is of such importance that it could not be left unnoticed here.

Sect. 3 of the Married Women's Property Act, 1882, provides that "any money or other estate of the wife, lent or entrusted by her to her husband for the purpose of any trade or business carried on by him," shall be deemed the husband's assets in the event of his bankruptcy. *In re Donaldson* ([1902], 2 Ir. R. 310) decides that "other estate" here is not to be construed as merely *ejusdem generis* with "money," and that the section will apply to furniture of the wife used in the husband's hotel, where they were living together, and for hotel purposes. The point is a small one, but seems hitherto uncovered by direct authority.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

State Intervention in English Education. By J. E. G. DE MONTMORENCY, LL.B. Cambridge: University Press. 1902.

We can confidently recommend the perusal of this short history to all those who are interested in Education: that burning question of the day. We are not quite sure we go so far as Mr. de Montmorency in his estimate of the practical value of history, and are afraid that the present party passions and conflicting interests would not have been allayed by even the best history of Education in England. He, however, thinks that "had such a history been produced seventy years ago, England would have spared some, at least, of her present educational troubles. Many of the mistakes of fact, many of the errors in policy that crowd into view when we survey the educational history of those years, appear to have been directly due to the neglect of the historical aspect of National Education." The object of the Author is modestly expressed thus: "The aim of the Author has been the aggregation in a convenient shape of facts hitherto widely scattered, and in some cases only contained in books and documents that are difficult of access." A large amount of research and labour has evidently been expended, and the results weighed carefully, and with a remarkable impartiality. The impression produced by reading the whole is a feeling of surprise at the interest taken in, and the attention devoted to, education in the so-called *Dark Ages*, by both Church and State. It is surprising to note the number of scholastic foundations, and the keen struggles to secure the profits or monopoly of them, as evidenced by the interesting references to the *Beverley Grammar School Case*, and the *Gloucester Grammar School Case*. There has been much controversy as to the part the National Church has taken in relation to Education; and the facts on both sides will be found here clearly and fairly stated. Mr. de Montmorency's own verdict is, that in spite of the Church having in certain ways retarded the growth of education, by crushing the Lollard Schools, by formulating the doctrine of Benefit of Clergy, and by exclusiveness and political bias, yet all these changes "weigh little or nothing

against the aggregated labours of the Church." We regret that our space will not allow us to call attention to many of the interesting pieces of information collected here, but we should like to call our readers' attention to the points, that *English* education really began in consequence of the Black Death, the effects on education of the suppression of the Chantries and Monasteries, and the genuine efforts made by Elizabeth's Government to reconstruct a national scheme of education. Further subjects of great interest are the remarkable attitude of the Commonwealth to education; the lethargy of the 18th Century; and the different systems of education started in Ireland, the Isle of Man, and the Colonies. This most interesting "Short History from the Earliest times down to 1833" concludes with Appendices containing, *inter alia*, the text of Lord Brougham's speeches of 1820 and 1835, and that of Mr. Roebuck of 1833.

Practical Legislation. By LORD THRING, K.C.B. London: John Murray. 1902.

This small book contains a treatise "written many years ago for the instruction of the assistant draftsmen in the office of the Parliamentary Counsel." It is now re-published with an introduction and alterations. The introduction is written in a very pleasant style, and contains an interesting notice of Lord Thring's official experience with both Gladstone and Disraeli. Of Gladstone he says: "Mr. Gladstone's was the most constructive intellect with which I ever was brought into contact, and also was the most untiring in devotion to its object. He understood and revised every word of a Bill, and even settled the marginal notes." As for Disraeli: "He seemed to have an intuitive perception of what would pass the House of Commons, but he cared nothing for the details of a Bill, and once satisfied with the principle of a Bill, he troubled comparatively little about its arrangement or its construction." We would gladly quote more from the introduction which is full of useful hints with some happily expressed criticism of legislative critics, but it is better to recommend our readers to read it for themselves. A very important chapter is that entitled "Arrangement of subject-matter of an Act," where most valuable rules are given how to set about this most difficult task, and illustrations given of how the selection and statement of principles, which is the first thing to be considered, has been accomplished in various Acts, both simple and complicated. We should like

particularly to call attention to Lord Thring's remarks on "referential provisions" and his condemnation of "the practice of passing an Act which cannot be understood without referring to the enactments contained in some other Act." He also calls attention to the observations of Lord Justice Mathew in *Knill v. Towse* on this practice. We agree with the suggestion that marginal notes should receive more attention; they might be made very useful. It seems to be the law, though it is not quite clear (compare re *Venour's Settled Estates* and *Sutton v. Sutton*), that the marginal notes are not part of the Act. The chapter on "Composition of Sentences" must be useful to anyone who either has to draw, or consider the meaning of an Act. We cannot conclude better than by calling the attention of all draftsmen to Lord Thring's dictum that "Law is made for man, and not man for law."

Digest of Public Health Case Law. By J. E. R. STEPHENS. London: The Sanitary Publishing Company. 1902.

Mr. Stephens seems to have been rather uncertain as to what name to give to this Digest of Cases. In his preface, he accounts for its appearance on the ground that as far as he is aware "no work has previously been published dealing *solely*"—the italics are ours—"with Public Health Decisions, &c." But a little lower down he says, "There are several subjects dealt with in the work which can scarcely be said to come within the meaning of Public Health—such as Highways, Markets, &c." With the latter statement we quite agree. Some of the decisions given are connected very remotely with Public Health Law, and some, as far as we can understand, not at all. Several of the cases on Rating seem rather remote from, and those on Hawking altogether unconnected with, this subject. However, this criticism, if correct, only indicates that Mr. Stephens has included more in his digest than he need have done, and does not infer any shortcomings on his part in respect to the cases which do relate to Public Health, a great number of which will be found in this work.

Pleas of the Crown taken at Bristol 1221. By EDWARD J. WATSON, F.R.Hist.S., F.R.S.L. Bristol: W. Crofton Hemmon. 1902.

Mr. Watson has edited the Pleas of the Crown for the Hundred of Swineshead and the Township of Bristol taken in the year 1221.

Any information on so early a period of our legal history is interesting, and the long and learned introduction is both readable, and instructive. One of the most interesting points to which our attention is called is that of the presentment of Englishry, which seems to have gone on for years after it had lost its meaning; though it was probably necessary to save a hundred from a *murdrum* or murder tax. No presentment of Englishry is made under the Bristol pleas, as under its charter that town was exempt. Another interesting subject is that of *deodands*. We find instances of a yoke of oxen and two boats whose value is forfeited for having been connected with deaths of persons. A curious instance of evidence is that which seems to have been given by a sort of jury of matrons on a charge of rape. But perhaps the most interesting entries historically are those relating to the Jews, as cases relating to them are rarely found in the records of any court except the one created specially for dealing with them, *i.e.*, the Exchequer of Jews. There are some entries of great importance relating to the early position and duties of Coroners. There are numerous side lights on the position and politics of Bristol; and all students of history are indebted to Mr. Watson for this contribution towards the elucidation of many interesting questions.

The Inner and Middle Temple. By HUGH H. L. BELLOT, M.A., B.C.L. London: Methuen & Co. 1902.

There is a vast amount of literature connected with the Temple, as is shown by the Bibliography that will be found at the end of this work, but no connected history of it has yet been published. This want Mr. Bellot proposes to supply, and the result is an undoubted success. He has shown great industry in collecting his materials, judgment in selecting from them, and skill in describing in a clear and pleasant manner the "legal, literary, and historical associations" of the Temple. The book is intended to serve not only as a history of the Temple, but also as a guide to the buildings, and to a certain extent these two subjects are kept apart; but as is inevitable from the nature of the materials, they are often blended. It is remarkable how much solid information the Author contrives to impart without being either dull or heavy. He commences with the early history of the Temple, followed by a description of the buildings in the Inner Temple and some of their inmates. This, like other chapters,

is not confined to the Temple, but includes notices of places of interest in Fleet Street. The next two chapters are devoted to an historical sketch of the Inner Temple with references to many distinguished lawyers, and also to perhaps even better known authors, from Johnson and Boswell to Hallam and Tennyson. We need scarcely say that that sincere lover of the Temple, Charles Lamb, is not forgotten. The Middle Temple is similarly treated in two parts. There are other chapters dealing with the Church, the Revels, and the Plays and Masques. An interesting chapter is the one on the gardens. Chapters are also given on the Order of the Coif, Serjeants' Inns, and the Inns of Chancery. Last, but by no means least, we must call particular attention to the wealth of illustrations; some of these are reproductions of valuable old pictures, including two by Hogarth, some are from modern photographs, and a large number are charming drawings and vignettes.

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The Law of Copyright: English and American. By E. S. MACGILLIVRAY, LL.B. London: John Murray. 1902.

One qualification at any rate to write on the Law of Copyright Mr. Macgillivray possesses, that is a thorough knowledge of its defects. He expresses his opinion of the state of the law in plain terms in his introduction. He describes the present law as "bad both in substance and form," and "perhaps the most complicated and obscure series of statutes in the statute book." He considers that "there are probably more pitfalls for the unwary in dealing with Copyright than with any other branch of the law." It will not then surprise the reader to find on page after page questions referred to as doubtful, uncertain, and undecided, and much praise is due to the Author for the ability, as well as the courage, with which he essays to supply answers to the problems which have been left unsolved either by statute or decision. His analyses of the effects of statutes are remarkably clear, and his definitions often excellent. His opinion on doubtful points is given clearly and decidedly, and authority quoted for it when it exists; but with few exceptions there is not much discussion of, or lengthy quotation from cases. The first part deals with Copyright in the United Kingdom and the Dominions of the Crown; the second part with Copyright in the United States. The difficulties begin at the very commencement of the subject. The definition of a "book" in 5 & 6 Vict., c. 45, is

not exhaustive, and the Courts "have strained the ordinary dictionary meaning of the word to the utmost." The Author's own definition is "original literary matter in such tangible form as readily conveys ideas or information to the mind of the reader." We are afraid that some cynical people might say that there are some productions, acknowledged by all to be books, which do nothing of the sort. Even the part of the statutory definition which requires a book to be "separately" published is not clear, and is taken by the Author to apply not to a volume or part thereof, but to a sheet of letterpress, music or such-like. *Walter v. Lane* is of course referred to in connection with the elementary question of what is a book, but though it is admitted it has considerably cleared up the law, it is pointed out that it should not be carried too far. An interesting question is here just glanced at, as to whether there can be copyright in verbatim reports of judgments, or whether, as has been held in America, that would be against public policy. We may call attention to the clear manner in which the difficult question as to publication of speeches or sermons is treated. It is remarkable to find that it is still doubtful whether at the time of publication the Author, in order to be entitled to copyright, must be a British subject, or resident within the British dominions. On the first of these questions the House of Lords differed in the case of *Routledge v. Low*, Lords Cairns and Westbury being of one opinion, and Lords Cranworth and Chelmsford of another. The Author points out that on the strength of the opinions given by the law officers on this point, English authors were under the Chace Act enabled to obtain copyright in the United States, and that it would be "most unsatisfactory if the law of England were now to be declared contrary to the advice then given." It does not seem clear whether co-authors are joint owners with right of survivorship or not. On the question of assignment, Mr. Macgillivray considers that "the case law on the subject is in a most unsatisfactory condition" owing to the Courts not having "sufficiently distinguished between an assignment before and an assignment after publication." He is of opinion that an assignment before publication need not necessarily be in writing, but after publication it must. The importance of the distinction between an assignment and a licence is strongly emphasised, and the test suggested is, whether the contract "bears the impress of a reliance by the grantor on the personal skill or reputation of the grantee." If it does it is considered to be a licence. The evidence

of piracy is tersely and amusingly put, beginning with "coincidence of blunders." In the chapter on "What is a piratical copy?" we may call attention specially to the opinion of the Author on the important points of abridgments and translations. It may be new to many of our readers that by the Copyright Act the Judicial Committee of the Privy Council have, after the death of the author, the power to give a licence to publish a book if the proprietor refuses to republish it. It will not, perhaps, be a surprise to learn that there is no record of any attempt having been made to enforce this provision. There seem to be as many difficulties in connection with dramatic performing rights as with books, for "as to what amount of dramatic element is required is not clear from the statute, and not much clearer from the decisions." It is, however, satisfactory to know that there must be some dramatic element. It is very difficult in many cases to construe the words "first published" as applied to performing rights, and we find a useful series of cases given, in which the publication and performance have taken place in different countries, and how the copyright is thereby affected. The most doubtful question as regards copyright in engravings seems to be whether the engraving must be made within the British dominions. It is rather curious to notice in the interesting chapter on Colonial Copyright that the Canadians, impatient of the delay in copyright reform in this country, have passed a Copyright Act of their own, which, however, Mr. Macgillivray suggests, may be *ultra vires*. Besides International Copyright this first part deals further with "passing off" at Common law, unpublished works, letters, and publishing and printing agreements. We can also recommend perusal of the second part, dealing with the American law of Copyright. This is valuable, as is pointed out, both from commercial and legal interest, and is necessary for all readers who desire to get references to analogous cases decided on the American Statutes, as the Author has cited no American cases in the first part of his book, on the ground that the practice of citing American cases promiscuously is "confusing and misleading." There is an Appendix of Statutes—English and American—and International Conventions.

Second Edition. *The Law of Tramways and Light Railways.*
By SEWARD BRICE, M.A., LL.D., K.C., and B. J. LEVERSON, M.A.,
LL.M. London: Stevens & Haynes. 1902.

Though the first edition of this useful work was only issued in

1898, the exercise of the powers of the Light Railways Act 1896—then recently passed—has been so considerable, that the necessity for a new edition to describe the practice before the Commissioners, and the decisions on the Act, has become apparent. A number of valuable new precedents have been added, including Model Forms of Orders, Clauses, Agreements for various purposes, Bye-laws, etc. It is particularly worth attention how the clauses, granting a power of purchase to the local authorities, vary that given by section 43 of the Tramways Act 1870. A new and important feature in the present edition is the chapter on Electric Traction, for which Mr. Leverson is responsible. It is divided into modes of user, obstacles to user, provisions relating to user, and liability arising from user; all of these are clearly and concisely dealt with. From the greater development of electric traction in America most of the cases cited in connection with the last of these headings are American, and there seems to have been only one case decided in England on the question of liability for electric interference, *i. e.*, *The National Telephone Company v. Baker*. An important question arose there as to how far the principles laid down in *Fletcher v. Rylands* are applicable to electrical interference. It is doubtful, in spite of the decision in the former case, whether such principles would now be followed to their full extent. The American cases are against such a view, and a recent case in the Privy Council, *Eastern and South African Telegraph Co. v. Cape Town Tramway Co.* has thrown doubt on the soundness of Mr. Justice Kekewich's opinion. By a clerical error, the reference to this last case is given as 18 Times Rep. 223, instead of 523.

Second Edition. *The Law of Waters.* By H. J. W. COULSON and URQUHART A. FORBES. London: Sweet & Maxwell. 1902.

The Law of Waters treats of a very wide range of subjects, including as it does "rights and duties of riparian owners, canals, fishery, navigation, ferries, bridges, and tolls and rates thereon." It is, perhaps, not necessary to state that all these subjects are not treated of exhaustively, or this work would have spread into many volumes; but the amount of information given on each is considerable and valuable. For instance, nearly one hundred pages are devoted to the subject of "navigation, and therein of conservancy," in which is included many of the rules made by Orders in Council. Twenty-seven pages are given to the important subject of rates on

no less than six varieties of property, viz., Piers, Harbours, Docks and Marine Property; Rivers and Ferries; Fisheries; Canals; Water Companies; and Bridges. This space is hardly sufficient, but it is supplemented by full references in the notes to the most important cases. Some important questions do not seem to be settled yet, such as the right of the Crown to the ownership of the soil of the bed of the sea below low water-mark. The learned Authors are of opinion that "it would appear now to be finally settled by *Reg. v. Keyn*, that the Crown has no such rights below low water-mark," but they call attention to the earlier decisions of *Gammel v. Commissioners of Woods and Forests*, *Gann v. Free Fishers of Whitstable*, and *Johnson v. Barrett*. The question of the ownership of the soil in large navigable lakes also seems to be doubtful, for though it has been decided in *Bristowe v. Cormican* that "the Crown has no *de jure* right to the soil and fisheries of large non-tidal navigable lakes," yet, "it is left in doubt whether the presumption of ownership *ad medium flum aque*, which exists with regard to owners of land on the banks of non-tidal streams of running water, exists also on large navigable lakes." Lord Blackburn did not seem to think that it would, on the ground that "it does not seem convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the Lough many miles in length tacked on to his frontage." However, the soil must belong to somebody, and if it does not belong to the Crown to whom can it belong except to the adjoining proprietors? Rights of riparian owners, and consequently their duties, are fully considered, both as to the right to water in its natural quantity, and in its natural quality. A rather more difficult subject, and one which we should think has led to more litigation, is connected with artificial watercourses, and other acquired rights of water and easements of watercourses. The subject of fishing is divided into the various rights of fishery, and the statutory regulations affecting the same. Attention is called to the confusion that has arisen from the ambiguous use of the term "free fishery," and it certainly is also rather misleading, that there should be two different kinds of fishery known respectively as a common fishery, and a common of fishery, the latter of which is the same as a free fishery. The rights and liabilities of Docks and Water Companies depend largely on statutes, but a number of important cases have been decided in reference to them, and will be found referred to and commented upon here. In dealing with so large a mass of

materials as the very wide scope of this work affords, much care and discrimination have been shown, and the work has been planned with a due sense of proportion. It is not so large as to be unwieldy, nor does it attempt to supply the place of the treatises written specially on some of the subjects. As it is now over twenty years since the first edition was published, it is easy to see what an amount of labour the Authors must have employed in revising their work, in view of the number of important statutes and cases, references to which have had to be incorporated.

Second Edition. *The Law relating to the Administration of Charities.* By T. BOURCHIER-CHILCOTT. London: Stevens & Haynes. 1902.

As the title indicates, this work deals mainly with the *administration* of Charities. We say mainly, because it is obvious that some points of principle such as: What is a Charity? and the duties of Trustees, have necessarily to be considered if the subject of administration is to be properly understood. The object the Author had in view is well expressed in the preface to the first edition, where he describes it to be "the collection and annotation of the Statute law relating to the administration of Charities by the Charity Commissioners, and under the Local Government Act 1894, by the various bodies brought into existence by that Statute." To this summary must now be added, the London Government Act of 1899, the Board of Education Act 1899, and Orders in Council made thereunder. The administration of Charities is not an easy subject, it is not easy to say what is a Charity, or what Charities come under the jurisdiction of the Charity Commissioners. The question of Parochial Charities, under the Local Government Act 1894, also presents several interesting but rather difficult questions, which will no doubt some day give profitable employment to the profession. When consulted on any of these points we recommend our readers to consult Mr. Bouchier-Chilcott's book. He has annotated the Acts with great care, discretion, and learning, and also gives valuable references to those principles of Common law and Equity which relate to the subject. Nearly half the volume is taken up with the Charitable Trusts Act of 1853, and many of the notes thereon are very important, of which we may point out that on sect. XVII, which requires notice to be given to the Board before

the commencement of legal proceedings. The object of this section was stated by Lord Hatherley as being "to put an end to certain very scandalous proceedings on the part of individuals who, ascertaining that there was a fund disposed for the purpose of charities which had been overlooked, and thinking that a considerable profit might be made in the way of costs, instituted proceedings which were not likely to produce good to anyone"; that on sect. XXII, relating to the removal of officers; that on sect. XXIV, as to sale or exchange of charity lands; a long note on sect. XXVIII, dealing with appointment and removal of trustees; and the longest and perhaps the most important of them all, namely that on sect. LXII, the exemptions from the operation of the Act. In this note we might especially call attention to the discussion on the jurisdiction of the Commissioners in the case of "Charities of a mixed nature with other sources of income." The other Acts annotated are the Charitable Trusts Amendment Act 1855, the Charitable Trusts Act 1860, and various less important Acts down to the Local Government Act 1894, and the London Government Act 1899. In the Appendices are contained the Roman Catholic Charities Act 1860, which is annotated; the Charitable Trustees Incorporation Act 1872; the Board of Education Act 1899; Statutory Rules and Orders; and forms of Applications. The index is full and satisfactory, but the book would be rendered much more useful for reference if the number of the section of the Act being considered was always given in the margin, and if in the numerous cross-references, the number of the page referred to was given instead of merely *ante*, or *post*, as the case may be.

Third Edition. *Admiralty Practice.* By the Hon. Mr. JUSTICE BRUCE, D.C.L., and CHARLES F. JEMMETT, B.C.L., M.A., M.L., assisted by GEORGE G. PHILLIMORE, B.C.L., M.A. London: Sweet & Maxwell. 1902.

Although the short title of this work is "Admiralty Practice," it deals with both the Jurisdiction and Practice in Admiralty Actions and Appeals, and nearly half of it is devoted to the former subject. Since the issue of the last edition in 1886, there has been a large number of important cases decided; and we must regret that the learned Authors have not seen their way to include more of the substance of the cases in the text, instead of relegating it to foot-

notes. We cannot help thinking that a very large bulk of notes is inconvenient for reference; and here the proportion of the pages taken up by notes is very unusual. Apart from this criticism as to form, the work of revision seems to us to have been carried out admirably. The Authors are not satisfied with simply giving the decisions, but frequently criticise them, and when they dissent from them give their reasons for doing so. A remarkable instance of this is the long and elaborate examination and criticism of the opinion expressed by Sir Francis Jeune, in *The Dictator*, "that in an action *in rem*, where the owners of the property had appeared, judgment can be enforced in the action to the full amount of the claim pronounced for, even though the amount of that claim should exceed the value of the property proceeded against." We notice that the opinion is expressed that the Admiralty rule as to division of damages would apply in cases of personal injury caused by a collision, in spite of the *dicta* of Lords Herschell and Macnaghten in *The Zeta*. There is an interesting note on the case of *The Gas Float Whetton No. 2*, where it is pointed out that in the judgment of the House of Lords no reference is made to the jurisdiction of the Admiralty Division to reward salvors of property lost at sea, and condemned as droits of Admiralty. Other valuable criticisms are to be found in the notes on the cases of *The Renpor*, *The Heinrich Bjorn*, *The Blessing*, and *Robson v. The Owner of the Kate*. Another note we may refer to is an important one doubting the opinion of some text writers, "that the maritime lien on cargo can only be enforced so long as the cargo continues to appertain to the owner whose property it was at the time of the creation of the lien." The part of the work on Practice must, we think, have given the most trouble; as the task is one of infinite difficulty, as pointed out in the preface, "to weave together in a treatise the new Rules and the remnants of the old"; and also to deal with the difficulty arising "from the terms expressing the conditions and savings under which Acts of Parliament have been repealed by the Statute Law Revision Acts." We can with confidence say that infinite pains have been taken "to cope with these and similar difficulties, and to arrange in as concise and methodical form as possible, the various regulations which now affect Admiralty jurisdiction and practice." All particulars of practice are gone into most thoroughly and minutely, and as much light as possible thrown on the many difficulties that arise from the curious combination of

Rules and Statutes. It will be surprising for any one not versed in Admiralty practice to note in how many instances the Supreme Court Rules either are found difficult to apply, or are not in use in the Admiralty Courts. For instance, it is pointed out that Order XII, rule 22, as to intervention, is difficult to construe on account of the nature of actions *in rem*; that having regard to the difficulty of construing the Rules of Court now in force as to the delivery of pleadings, the notice should in all cases, except where the writ is indorsed under Order III, rule 6, state that the defendants require a statement of claim: that the old rule of appearing under protest appears to be still in force: that there is considerable doubt as to the filing of notices and proofs used in undefended suits. Again, "it may be doubted whether the provisions of Order XV are applicable to Admiralty actions." These are but a very few of the numerous instances we have noted, where it is pointed out that there are doubts and difficulties in the practice, and they illustrate the care and labour which have been bestowed in the hope, that the Authors indulge in, that this Edition may be "a safe and convenient guide to the existing procedure." We have no doubt that any practitioner who refers to it will at once agree with us that this hope is thoroughly justified.

Fourth Edition. *Company Law.* By FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1902.

There is no greater authority at the Bar on Company law than Mr. Palmer, and the present edition of this work is quite worthy of his reputation. It is well described by its sub-title, as "a practical handbook for lawyers and business men." It is not, and does not profess to be, exhaustive of all Company law. If it was it could not have been compressed into one substantial, but not inconveniently large volume. In fact, the text of the work only occupies about 350 pages, the rest of the volume consisting of Appendices containing the Companies Acts, Rules, &c. But in spite of this qualification we doubt if the reader will be ever at a loss for either information on the point he searches for, or a reference to some other work of Mr. Palmer's where it can be found. A very marked feature of the Author's treatment of his subject is the eminently clear and practical manner in which the subject is dealt with. To be able to treat a difficult and complicated subject clearly and

practically demands both great knowledge, and wide experience. Mr. Palmer possesses both these qualities in a high degree, and the result must be eminently satisfactory not only to lawyers, but to the larger class, for whom he has also written, of business men. The Author does not hesitate to give his opinion on controverted and doubtful points, and to criticise judgments, even those of the House of Lords. As an instance, we may refer to his discussion on the decisions on the difficult questions of the binding force of regulations, both between the company and the members, and the members *inter se*, in which doubt is cast on the authority of so great a judge as Lord Cairns. The important principle that a company is a *person* is duly emphasized, and we find pointed out "the legal quagmire into which the neglect of this principle may conduct even the most learned judges." This is an allusion to the well-known *Saloman's Case*, with the decision in the House of Lords, in which case Mr. Palmer cordially agrees. The doubt of Cozens Hardy, J., in *Conssett Iron Co.* is not agreed with, and a large number of cases are given in which the Court had sanctioned "an alteration which introduces a series of new objects in modern form *instead* of the old objects."

The Author also disagrees with Lord Lindley's decision in *Bartlett v. Mayfair Property Co.*, on the question of the power of a company to mortgage its reserve capital. We are glad to see that once more the epithet *gross* as applied to negligence is deservedly criticised. It is worth noting Mr. Palmer's opinion on the important question, which has yet to be decided, as to whether breach of the requirements of sect. 10 of the Companies Acts 1900 gives the subscriber a right to rescind. He thinks that "the misstatement of a material fact will, of course, give a right of rescission, but where the breach consists in the mere omission to state some fact which ought under this section to be stated, and the omission to make that statement does not falsify that which is stated, it will probably be held that there is no right of rescission." There is a very clear description of the objects sought by the conversion of businesses into private companies, and the advantages thereby obtained. We could wish Mr. Palmer had discussed the curious case of *Laxon & Co.*, to which he refers more than once rather satirically. We think there must be some misprint in page 147, where "sect. 61, 62 of the Act" are referred to in connection with the personal liability of directors on contracts. We presume the Act means the Companies Act 1862, and we cannot see what the sections referred to have to do with the matter.

CONTEMPORARY FOREIGN LITERATURE.

I. Diritti sulla Propria Persona nella Scienza e nella Filosofia del Diritto. By DR. ADOLFO RAVÀ. Turin: 1901.

A thesis for the Doctorate in the University of Rome. Its gist is the limits of individual right, the *potestas in se ipsum*. It is Mill on Liberty from the point of view of a jurist. The authorities are reviewed, the earliest and most interesting being the *Tractatus de Potestate in se ipsum* of the Spanish jurist Balthasar Gomez de Amescua (Milan, 1619). Among other questions discussed by Dr. Ravà are suicide, vows of chastity, marriage of the insane and diseased, and the legality of the pound of flesh contract in the "Merchant of Venice." The author's conclusion is that modern systems of law in their protection of the individual are apt to lose sight of the protection of society.

La Ragione ed il Contenuto del "Tort" nel Diritto inglese. By DR. MARIO SARFATTI. Turin: 1902.

This is a thoughtful comparison of the English and Italian law of tort, unfortunately in places disfigured by bad printers' errors in transcribing English authorities, such as "Nothingham," "*New Harlston Collinies Co. v. Earl of Westmorland*," etc. One of the main differences is that English law, eminently individualistic—to use Dr. Sarfatti's phrase—does not visit the parents with the torts of their infant children, while Italian law recognises the collective responsibility of the household, its chief being the official who is legally liable.

De l'Abrogation de l'Article 1715 du Code Civil. By DR. MARIO SARFATTI. Turin: 1902.

In this small brochure Dr. Sarfatti makes an excursion into the French Code. He would have § 1715 replaced by § 1217 of the Italian Code, on the ground that *arrha* ought to be sufficient proof of delivery without confirmatory verbal evidence. This would do away with the necessity of admission of the oath of the party, allowed by § 1715 as against a bailee who denies the fact of delivery.

PERIODICALS.

Journal du Droit International Privé. Nös. V—X, 1902. Paris.

The sketches of the English death-duties by M. Jobit and of the Russian bar by M. Pergamainte of Odessa, will be found interesting by English readers. From the latter we learn that its present organisation is quite modern, dating only from 1864, that a distinction is drawn between sworn and unsworn advocates, and that both kinds alike can sue for fees, whether under special contract or implied liability of the client. Russia appears again in the article on her extradition law by Professor P. Kazanski of Odessa. M. Paul vander Eycken gives an account of the *Chambres Arbitrales d'Avocats* at Brussels, and sets out their rules of procedure. They seem to have been called into existence in emulation of the commercial tribunals of arbitration at Antwerp. The Belgian Bar evidently does not see why laymen should have all the good things in arbitrations. In England we have reached the Antwerp stage in our large commercial cities; it may be that some day we shall attain the Brussels stage. The review contains the usual valuable digest of decisions in the Courts of various nations.

Deutsche Juristen-Zeitung. 1 July—15 Sept., 1902. Berlin.

At page 314 is a discussion of the German law that public-houses are to be opened later and closed earlier on Sundays and holidays. The law appears to be much less definite in its terms than the provisions of the Licensing Acts dealing with the component parts of the United Kingdom. In particular, the writer notes that the *bonâ fide* traveller (the English phrase is used) has no rights in Germany. Curiously enough, a few pages later, at page 361, another writer objects to the importation of foreign words and the coining of new German words in German law books. The number of September 15 is chiefly occupied by a report of the proceedings of the *Deutsche Juristentag* at Berlin in August. It also contains a dedicatory poem by Justizrat Albert Träger, the concluding line of which is worth remembering by lawyers of all lands:—

“Für Recht und Wahrheit kämpfen die Juristen.”

A very interesting sketch of the history of the *Juristentag* is given. It met for the first time at Berlin in 1860, and has met every year

since—except during the stormy periods of 1866 and 1870—in some important town in Germany; only twice in Austria. Portraits of Presidents of the Tag, past and present, will be found on a loose leaf. Among them the English reader will recognise *inter alios* the great names of Bluntschli, Brünner, von Gneist, and von Holtzendorff.

Zeitschrift für Internationales Privat—und Öffentliches Recht.
Nos. XI, XII. 1902. Leipsic.

These numbers, besides their inherent interest, will be found useful as containing in a convenient form various important documents, especially the Suez Canal Treaty, the Nicaragua Canal Treaty, and the new Naval Code of the United States. There is a good deal of matter of interest to English and American readers. The decision in the *Paquete Habana* (175 U.S. 677) is reported at length and discussed. At page 111 is the report of a Hamburg Court, to the effect that an Englishwoman resident, apparently not domiciled, at Hamburg, may sue *in forma pauperis* in a Hamburg Court. The ground of the judgment is reciprocity, that such a right would be competent to a German resident in England. A paper on the position of consuls by M. Schina, of Bucharest, gives authority for the fact—not generally mentioned in text-books—that a semi-sovereign State may nominate consuls. The Danubian Principalities seem to have done this continually from 1833.

Rivista di Diritto Internazionale e di Legislazione Comparata.
April—June, 1902. Naples.

The most noteworthy matters in this volume are an article by Professor C. E. Huberich on *patria potestas* in Slavonic law, and a decision of the tribunal of Naples that while a consul is liable to an action in his commercial capacity, he is entitled to such privileges as to notice of action, etc., as the law of Italy allows to representatives of foreign powers. Moreover, no order can be made to produce his official papers.

La Giustizia Penale. 16 June—22 Sept., 1902. Rome.

Many matters of interest to the student of comparative law are to be found in this well-conducted fortnightly magazine. At p. 785 is a decision that a contractor who delegates part of the work to a sub-

contractor is not liable for the negligence of the latter, a statement considerably wider than can be found in the English authorities. Profit to the thief is not a necessary element in larceny. It may be larceny though the value of the thing stolen be infinitesimal, as in this case, a few growing grapes (p. 817). Where a man writes a letter containing a false pretence, and afterwards follows it up by a personal call, the letter being sent and the call made in different jurisdictions, the judge of either jurisdiction is competent to try the offender (p. 965). It rather offends English professional ideas to find in its pages the advertisement of a *Studio Legale*, a kind of bureau which undertakes appeals in criminal cases, and offers intending appellants the services of experienced counsel at a moderate figure.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—*Leake on Contracts*; *Commonwealth Statutes, Vol. I*; Van Zyl's *Judicial Practice of South Africa*; Saunders' *Practice of Magistrates' Courts*; *English Reports, Vol. 21*; Thwaites' *Guide to Criminal Law*; Watson's *Law of Cheques*; *The Modern Lawyer's Office*; Willis's *Contract of Sale of Goods*; Ringwood's *Principles of Bankruptcy*; Brentano's *Origin of the Knowledge of Right and Wrong*; Carleton's *Rheims and the English Bible*; Reeson's *Gas and Water Acts*; Carter's *Elements of Contract*; Scholefield and Hill's *Private Street Works Act, 1892*; Boulton's *Law and Practice of a Case stated*; Brooke Little's *Law of Burials*.

Other publications received:—*Natal Law Quarterly* (Wildy & Sons); *Report of the Hamburg Conference* (International Maritime Committee); *John Bull's Guinea-pigs* (Bradley & Co.); *The Humane Review*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*, *Columbia Law Review*, *Japan Register*.

THE LAW MAGAZINE AND REVIEW

NO. CCCXXIII.—FEBRUARY, 1902.

I.—THE LEGISLATURE AND JUDICATURE OF THE ISLE OF MAN.

THE scant information to be found in text books on English law, concerning the Isle of Man, leaves us practically in the dark as to the constitution and character of the Legislature and Judicature of that small but interesting country.

The Commentaries by Judge Stephen, founded on Blackstone, tell us that the Isle of Man is a distinct territory from England, and is not in general governed by the laws of England, but by acts of its own local legislature, called the House of Keys, and that neither does any Act of Parliament extend thereto, unless it is specially named, nor (the writ of *habeas corpus* excepted) does process run there from the English courts (Vol. 1, p. 98, edn. 12). The Commentaries then proceed with a short historical sketch taken substantially from Blackstone.

This is a fair specimen of the extent and sort of information available for the searcher after knowledge in matters legal in the Isle of Man.

We doubt much whether any loyal Manxman, or, indeed, any one familiar with the ancient and still unimpaired constitution of the Island would regard the expression, "a distinct territory from England," as adequately descriptive of a country with a history so interesting and a position so unique. The Island was an ancient kingdom so far as history takes us

back, feudatory, or subject from time to time to different powers, but whether it was Norway, Scotland, or England which enjoyed the suzerainty, the chief ruler of Man was, himself, within his own dominions, a king, and, as he undoubtedly wielded to the full, sovereign jurisdiction, so also, when he chose, he assumed the title and kept up the court of a reigning monarch. The full title employed was that of "King of Man and the Isles"; the latter word signifying the Southern Hebrides, which were anciently united with Man in one kingdom, but have long ceased to form part of the same. Thomas, Earl of Derby, in the reign of Edward IV., was the first sovereign of the Island who allowed the royal style to fall into disuse. He was probably possessed of a keen sense of humour, which the disparity between the grandeur of his title and the diminutive dimensions of his kingdom, was well calculated to evoke, and found relief in the adoption of the comparatively modest title of "Lord of Man and the Isles," which was afterwards borne by the sovereign of the Island until the purchase of the regalities thereof by the Crown of England in 1765. Notwithstanding, however, this surrender of the regal title, the sovereign rights appertaining to the lordship of the Island moulted no feather, the change being one of name merely.

It was during the reign of Henry IV. that the famous Stanley family first became connected with the Island. The Earl of Northumberland, to whom, six years before, the King, by letters patent, had granted the Island, forfeited the same in the year 1405 by his treason, and the Island was then granted by the King to Sir John Stanley, at first for life, and in the following year to him, his heirs, and assigns, subject to the service of rendering two falcons to the King of England for the time being on the day of his coronation. If we now make a leap of two hundred years, during which the Island

passed through many vicissitudes with respect to its government, we find James I., in the year 1609, by letters patent, settling the Island upon William, sixth Earl of Derby, and Elizabeth his Countess, for their lives, and the life of the survivor, with remainder to their son and heir apparent, James, Lord Stanley (afterwards seventh Earl of Derby) and his heirs. By Act of Parliament, 8 James I. (1610) the succession was varied, the limitations being made to the heirs male of the body of James, Lord Stanley, instead of to his heirs general as in the grant from the King, with further remainder upon his death, without such issue, to the heirs male of the body of such Earl William, and a final remainder in default of such issue to the rightful heirs of the said James, Lord Stanley.

Four descendants of the Earl William succeeded him as Lords of the Isle, but upon the death of James, the tenth Earl, in 1736, the sovereignty passed to James, second Duke of Athole, the heir general of James seventh, Earl of Derby.

The Atholes were the last Kings or Lords of Man. The pomp and glory of a separate and distinct sovereignty were to pass away, and be absorbed in the greatness of the British Crown. John, third Duke of Athole, and Charlotte, his wife, entered into a compact with the Treasury for the surrender of all their sovereign rights. So it came to pass that in the early days of the fateful year 1765, days when the fatuous Grenville was passing his Stamp Act for the American Colonies, and pursuing that mad policy whose fruits were rebellion and the humiliation of his country, provision was made by the statute 5 Geo. III. c. 26 (in the Island known as the Revesting Act) for vesting the Island inalienably in the King and his successors. There seems a sort of grim irony in the fact that the King's advisers, whilst paving the way for the loss of a continent to the British Crown, were at the same time gravely concerning

themselves with the acquisition of a relatively insignificant Island Kingdom.

The effect of the revestment, however, must not be misunderstood. The position of the Island, as an independent Kingdom, was thereby in no sense impaired. The acquisition, by purchase, of its sovereignty and the rights appertaining thereto, by the English Crown, merely effected a change of sovereign, and in no way destroyed or lessened the constitutional independence of the Island. If it be allowable for the purpose of illustration to compare small things with great, a parallel may be suggested in the accession of James VI. of Scotland to the throne of England as James I., an event which did not detract from the rights of either country as an independent Kingdom with its own Parliament and Judicature; the simple effect being the union of the two Crowns.

Prior to 1765 the legislative power was exercised by the King or Lord of the Island without reference to the Crown of England. The last Manx statute before the revestment was passed in the year 1763, and we find this enactment made "by the most Noble and Puissant Prince James, Duke of Athole, Lord Strange, Lord of Mann and the Isles, &c., with the advice and consent of the Governor, Council, Deemsters, and Keys of the said Isle, &c." Legislative sterility appears to have then supervened, and lasted for 13 years, as nothing again appears upon the statute-book until 1776. We then get the first statute of the revestment which introduces, now for the first time, the English sovereign as a part of the legislature of the Island, the form being "WE therefore the Lieutenant-Governor, Council and Keys of the Isle of Man in Tynwald assembled do with the permission of the King's most excellent Majesty ordain and enact and be it by the permission and authority aforesaid hereby ordained and

enacted." The designation in the Commentaries of the House of Keys as the local legislature is far from accurate. The legislative authority resided in the Lord, the Governor, and other officers and the 24 Keys. The latter branch being described as "the representative body of the said Isle." In 1647 we find the officers and the 24 Keys humbly praying the Right Honourable James, Earl of Derby, his Honor being then in court, to consent to a certain enactment. Upon another occasion in 1661, the Tynwald Court, which comprised all branches of the legislature (although not necessarily the King or Lord) was held in presence of the Deputy-Governor, the Deemsters, Officers and 24 Keys. Two important statutes dealing with a variety of topics became law in the year 1665. The sittings of the Tynwald Court, at which they were passed, were held before the Bishop, who, in this instance, was also at the same time Governor, the Deputy-Governor, and the Officers, Deemsters and 24 Keys. The Deemsters in early days were not always of the Lord's council, hence their presence, sometimes, and absence at others at Tynwald.

The Keys were originally in all probability a sort of advisory body to the Lord, convened as occasion required. We find them, however, as far back as 1417, taking part with the Lords Commissioners in making a public Act. There is, nevertheless, no authority for ascribing to the Keys the exclusive possession at any time of the legislative authority. Whatever confusion and irregularity may have existed in early days as to the precise constitution of such authority, it is abundantly clear that from the beginning of the 17th century the Lord, the Governor and Council, and the Keys formed the legislature of the Island. The statute-book affords incontestable proof of the unlimited nature of the powers of this little legislature, the subjects dealt with from time to time embracing all ordinary objects of legislation, civil, ecclesiastical, criminal,

military, relating to revenue, &c. It was always clearly settled that 13 Keys or a majority of the whole number were required to make a quorum, and necessary to the validity of an Act. The mode of election of the Keys was peculiar. When a vacancy took place in their body it was filled up by co-optation, the Keys choosing two persons whose names were submitted to the Governor, the one preferred by His Excellency becoming the Key elect. Sir Henry Brougham Loch (afterwards Lord Loch) in the early years of his reign as Governor of the Island, in 1866, induced the self-elected House, as it was called, to submit to annihilation, and since that date the Keys have been elected by the people on a fairly liberal franchise, which has undergone modification from time to time.

The most ancient records extant in the Island do not reach further back than the beginning of the fifteenth century. The Deemsters, as we have already seen, were not invariably members of the legislative or executive Council. Their position and functions in early days do not admit of easy definition. In conjunction with the 24 Keys they figure frequently in the capacity of legal oracles. Thus in the year 1419, the very dawn of Manx records, we find that:—

"Jenkin Moore and John Christiane, Deemsters by the Advice and Councell of XXIIII of the Land sworne by the said Deemsters the second day of December Anno Domini 1419 have given for law these points following."

The "points following" were ten in number and of very varied character, some being practically judgments or legal opinions upon concrete cases, whilst others were declaratory of general principles of law. For instance, numbers one and two treat of the Lord's Prerogative with respect to the goods of a *felo de se*, "the late wife of John Moore," who, it was recited, "did perish herself." The others are for the most part matters of general concern.

After an interval of three years the Lord Sir John Stanley, King of Man and the Isles in 1422, "*asked his Deemsters and the XXIII the laws of Mann in these points under written. To the which the said Deemsters with the XXIII gave for law that these be points of your prerogatives.*"

The "Points," numbering in this instance 99, and ranging over a very wide field of subjects, include nothing in the nature of an adjudication or opinion upon any actual case. Although the request of the Lord was apparently for an authoritative declaration as to the existing law, and many of the replies simply amount to this, it is very obvious that the Deemsters and Keys enlarged their office as they proceeded and had, before completion of their task, boldly assumed legislative functions. For example, number 92 begins with a recital of the evils which had arisen from unrestricted imports, and then goes on to the enactment of protective provisions. These 99 points are a queer medley. Most of them profess to be declarations by the Deemsters and XXIII in reply to the questions put by the Lord, and are prefaced by the preamble "we give for law." This is, however, not invariably the case, and we find the not infrequent obtrusion of the Lord himself as the authority. Number 33, for instance, provides "that all great matters and high points that are in doubt ever as they fall *I will* that my Lieutenant or any of the Council for the time being take the Deemsters to them, with the advice of the elders of your land of Mann to deem the law truly to the parties as they will answer to me thereof." Evidence to the same effect is to be found in such expressions as "my receivers," "my mine."

It can hardly be disputed that the earliest reference in extant records to the Deemsters and their duties exhibit them as exercising in a greater or less degree ordinary judicial functions. The title Deemster, too, clearly indi-

cates the nature of the duties which they were to discharge. As we have just seen, they were to "deem" or judge the law; and it was further provided by these very declarations or enactments of 1422 that all doubtful points should be registered up and laid in the Lord's Treasury so that "*one doome or judgment be not given at one time one way and another time contrary.*" Doome, it need hardly be pointed out, is merely another form of the word deem.

Here we come upon the germ and embryo of a judicial system, of a more settled and organised mode of procedure. Consistency in decisions is no longer to be left to the chance of mere memory and tradition, and the administration of justice is, for the future, to be protected from the risks of contradictory "dooms." Records are to be kept so that in the days to come precedents may be appealed to and consistency secured.

At the date of the revestment the Courts of Judicature were very much what they remained down to the year 1883, when the Island legislature passed a Judicature Act. The Governor, as the representative of the Lord, held cognizance of all pleas, civil or criminal, and, in conjunction with the other chief officers, constituted the Supreme Court of Justice of the Island, exercising practically universal Jurisdiction. The Governor was the Chancellor of the Island, and as such presided in the Chancery Court, assisted by the Deemsters and such of his council as he thought fit to summon. The latter, however, occupied the position of assessors merely, the Governor being the sole Judge of the Court. For a long period prior to 1883 the only officer besides the Deemsters who attended was the Clerk of the Rolls, who, as well as being the custodian of the public records, discharged the duty of taking the sworn testimony of witnesses and reducing it to writing for use when the case came for hearing before the Court. The assessors virtually managed the business and deter-

mined all questions of law and fact arising in the proceedings before them. At the same time all was done in the name of the Chancellor alone. This Court, in the main, exercised an equitable jurisdiction, based for the most part upon the practice and doctrines of English equity jurisprudence. The procedure, too, by bill, and answer upon oath, bore resemblance to that of the great sister Court. There existed, in addition, jurisdiction, in certain circumstances, over matters falling generally within the cognizance of Common law tribunals. Amongst these was the unique process known as an action of arrest, which may be said to have its faint prototype in the writ of *ne exeat regno*. Upon an affidavit being made by a creditor to his debt, and that he believed his debtor was about to quit the Island, and giving his reasons for such belief, process of arrest was issued, under which the person and worldly goods of the absconding debtor could be seized and held until satisfactory bail was forthcoming. But this description does not give an adequate notion of the extreme rigour of the process. What it may have been at one time, can, perhaps, be imagined from the fact that in 1777 "an Act for the prevention of arbitrary and unjust imprisonment" provided that if a debtor were about to leave the Island, his creditor (taking with him a civil officer) might cause such person to be imprisoned and detained for twenty-four hours, until regular process could be obtained. To owe a debt, or, indeed, even to be accused of owing one, subjected the suspect to as direful consequences as if he had been a felon; at any rate, for the space of twenty-four hours, no process warrant or oath being required in the meantime. It must not be imagined that this law has been repealed, or become obsolete. There it stands, the twentieth century notwithstanding, and, indeed, it is still frequently put into operation. The fact that more than 300,000 visitors land on the shores of the Isle of Man in a

single summer season shows how little terror this drastic law inspires; a result due no doubt to the justice and moderation displayed by Manxmen in the use of so formidable a weapon. Before 1846 process of arrest was issued against aliens *ipso facto*, no allegation of intention to abscond being required.

The constitution of the Court of Exchequer was the same as that of the Chancery. As a rule, after the sitting of the latter Court (which took place monthly except in January, May, September, and October), was over, it transformed itself into the Court of Exchequer, which took cognizance of all disputes and offences relating to the Lord's revenue rights and prerogatives, and wherein suits for the recovery of penalties for frauds upon the Customs were prosecuted. It had also a criminal jurisdiction over misdemeanours and all species of wrong which subjected the delinquent to the payment of a fine to the Lord. Both of these Courts usually proceeded without a jury, but it was competent for the Governor to direct one to be summoned. In more recent times the practice in the Chancery Court was to direct an issue, which was tried before one of the Deemsters and a jury.

The Court called "The Staff of Government" was constituted in the same way as the Chancery and Exchequer. It was an important tribunal exercising original and appellate jurisdiction. In a summary fashion and upon a simple petition, it dealt with matters which, in England, would be subjects of the writs of *habeas corpus*, *certiorari*, *quo warranto*, and prohibition. By means of the controlling power of the "Staff" (as it was for brevity's sake frequently called) the liberty of the subject was guarded; the inferior jurisdictions of the country were kept within their appointed limits; their errors redressed and, if necessary, the performance of their duties, commanded and enforced. Irrespective also of any

question of excess of jurisdiction or failure of duty there was an appeal from the decision of inferior Courts to the Staff of Government.

An appeal lay before the revestment from the Chancery Exchequer and Staff of Government Courts to the Lord, and from the latter to the English Sovereign. This is a fact worthy of attention. It might have been thought that the grant of the royal prerogatives to the Lord would have constituted him the final Court of Appeal, and so divested the English Sovereign of this attribute.

The case of *Christian v. Corrin* decided in 1716 (1 Peere Williams, 329) is, however, an authority to the contrary.

An interesting feature about this case is that it was argued on behalf of the Appellant by the reporter, Peere Williams himself, who describes it as an appeal from the Earl of Derby, King of the Isle of Man, who had "made a decree in the Island concerning lands there." The principal question argued was whether an appeal lay to the King in Council, there being no reservation in the grant made of the Isle of Man by the Crown, of the subject's right of appeal to the Crown. Peere Williams argued that, not only was such a reservation to be implied, but that even had there been express words in the grant to *exclude* appeals they had been void, the King having no power to take away the right from his subjects. This contention prevailed with the Privy Council, and so the continuance of the right of appeal to the Sovereign was determined upon high constitutional grounds. After the revestment, the appeal from these Courts was necessarily direct to the English sovereign.

Next we have "the Court of Common Law," which was described as "Before the Governor and all the chief officers and Deemsters," and which exercised jurisdiction as a Court of Common Pleas in all disputes between

subjects, whether relative to real or personal property. Here the trial was by jury, consisting formerly of six men in the case of real actions, and of four in personal actions, but subsequently of six in both classes of actions. It is probable that in this Court, as well as in those previously mentioned, notwithstanding the title applied to the Court, the Deemsters and officers were mere assessors, and the Governor really the sole Judge of the tribunal. It is quite certain that originally no Court could be constituted without the Governor, as by an Act passed in 1777, entitled "an Act for the better regulating the proceedings in the Court of Common Law," after making provisions for regular circuits and sessions of the Court, it is enacted that thereat the Governor "may preside by the Deemster." After this statute the practice became almost universal of trying all actions before a Deemster and a jury of six. When objection was made to his ruling on any question of law or evidence it was heard by the full Court. The proceedings before the jury were of a very primitive character. A declaration was filed by the plaintiff, couched in the old-fashioned style and revelling in redundancy of language. Occasionally there was a plea, or demurrer, but for the most part the action came on for trial upon no other pleading than the declaration of the plaintiff, who had to come prepared to defend himself against every conceivable description of attack which his own or his advocate's ingenuity might suggest to a defendant. It was not uncommon, after a protracted trial upon the merits, for the defendant to overthrow his unfortunate opponent, by dexterity in the discovery of some highly technical flaw in the declaration, or the neglect of some preliminary step in the early stages of the action. Another difficulty to be encountered by a plaintiff was that of getting his adversary into Court at all. To the present day in the Isle of Man, a defendant or witness can only be summoned to attend a

Court by an officer of the law, called a Coroner, but, in the case of the Common Law Court, the ceremony of summoning the party to appear had to be performed in the presence of two witnesses, who afterwards appeared in Court to testify upon oath to the event. A plaintiff was often kept long at bay by the skill with which the defendant eluded the vigilance of the Coroner and his men. There were six Coroners, each with a district beyond which he had no jurisdiction, except in the case of the Coroner of Glenfaba whose functions could be exercised throughout the Island. In these circumstances it was not difficult for a fleet-footed defendant to outrun the Coroner and his dogs, and hurl defiance at him from the other side of the petty stream which marked the limits of his power. The character of the country, with its numerous hills and dales, lent itself to the escape of such fugitives, and it was sometimes only as the victim of stratagems of doubtful propriety that the defendant finally found himself constrained to face the Coroner and his witnesses and submit to service. But it did not suffice for a plaintiff simply to catch his hare, the cooking was even then still a long way off. The case was never heard the first session, the declaration being then merely filed; and frequently the hearing was postponed from session to session, upon some pretext or the other, often of the flimsiest description. If the plaintiff failed, at any subsequent session, to make some motion in his action, the latter fell to the ground altogether, and in order to make such motion it was necessary to summon the defendant, and with all the formalities already described.

It was thus very easy for a plaintiff to lose all the benefits of the previous stages which his action had reached, and be driven to commence *de novo*. A plaintiff might avert this disaster by proving the employment of all reasonable efforts to effect service. To the intense amuse-

ment of the Junior Bar, and amidst the glee of the audience, thrilling tales were sometimes recounted in Court of the baffled efforts of the Coroner to bag his game, and the consequent discomfiture of that official. This with many other humorous phases of the Manx Judicature disappeared in 1883.

Either party dissatisfied with the decision of the jury might traverse their verdict and obtain a new trial by a larger jury, which had to determine according to the evidence previously given. There was a further traverse to the House of Keys.

The Appellate Jurisdiction of the latter was taken away entirely when they became elective, as already mentioned, in 1860, and a new procedure substituted.

The Deemster's Court, although of inferior degree, to those before enumerated, was the most largely resorted to of any Court in the Island. Except for a brief period there have always been two Deemsters each with universal Jurisdiction but holding his Courts for a district conventionally assigned to him. In this Court the Deemster was sole judge, and though his power to call a jury has been asserted, the practice of doing so had long since fallen into disuse, except in instances, where skilled persons are sworn to report upon some particular issue, such as the state of repair of buildings, a peculiar mode of trial applicable to a particular class of cases only. By the Judicature Act of 1883 the jurisdiction of the Deemster is transferred to the High Court, but it is provided that the old practice in the Deemster's Court shall continue. In substance, therefore, this Court is very much to-day what it has been for hundreds of years. The secret of its endurance and success may be traced to three causes—namely, (1) Its summary mode of procedure; (2) its being presided over by one of the Judges of the High Court of the Country; and, last, but not least (3)

its cheapness. So extensive is the jurisdiction of this court that it would be difficult to define its limits. In matters of debt a suit may be brought for any amount, there being no such thing as a maximum. Within the last year in a certain case the claim exceeded £140,000.

And it matters not whether the claim is technically speaking an action of debt or otherwise, as, provided the liability be in respect of a liquidated amount, redress can be had. In cases, too, where the claim sounds in damages only, if these are such as to be susceptible of easy and definite estimation, as, for instance, where goods have been lost by a carrier or destroyed by negligence, there is jurisdiction. Although the title to real estate cannot be tried in the Deemster's Court, suits for possession of lands and houses are entertained, provided proper expedition be shown in resorting to this tribunal, and there be no question of title involved. In many respects the matters dealt with and the remedies applied savour more of an equitable than a legal jurisdiction. For instance, injunctions against the continuance of nuisances, interference with easements, or to prevent injuries to lands, frequently emanate from this court, and specific relief is given in a variety of other cases.

The procedure of the court is simplicity itself, too simple perhaps for the magnitude and importance of many cases now frequently tried before it. The Plaintiff merely serves what is generally called "an account," stating roughly what his claim is for. This must be served three days before the court day. When the case is called in open court the defendant, if not ready to admit judgment, states orally what his defence is, or asks to be allowed to serve same in writing, and then the case stands continued for proof, and comes on for hearing upon a subsequent court day to which the defendant must be again summoned.

By the Isle of Man Judicature Act, 1883, all the Courts

referred to (except the House of Keys, whose jurisdiction had been previously abolished) were united and consolidated into one Court of Judicature under the name of the High Court of Justice of the Isle of Man.

But here I must leave the subject. I have made no attempt to treat of the Criminal and Ecclesiastical Jurisdictions, the courts of the several small Baronies, and the numerous quaint methods of procedure before different kinds of juries prevailing in the Island. Not that these subjects are wanting in interest, but because having regard to the limits of space, and to the relatively greater importance of those Courts which in 1883 were merged in the High Court of Justice, I have deemed it advisable to confine my remarks to the latter.

G. A. RING.

II.—DRUNKENNESS AND CRIME.

THE relation of drunkenness to crime is a matter of interest to students alike of law, of medicine, and of social phenomena. It is a question, moreover, upon which the exponents of these several sciences are seldom in complete agreement, and often in widest antagonism to one another. This being so, it is scarcely surprising that the bulk of the literature upon this subject should have little relation to the consensus of opinion thereby engendered. The new-born century may have unexpected developments of theory and practice in store for us. Meanwhile a humble hierophant in the temple of Jurisprudence will content himself with trying to catch the utterances of his own particular oracles, and leave the future to adjust and decide between the pretensions of rival shrines. The legal theory of intoxication is indeed in itself sufficiently difficult and important to demand close attention.

Intoxication is an event involving juristic consequences of various kinds. It may be considered, (1) as a ground of irresponsibility for crime ; (2) as a cause of civil disability ; (3) as an offence punishable by law ; (4) as a subject of special curative treatment defined and directed by specific legislative enactments.

For the present we may fix our attention upon the first of these incidents alone, viz., on drunkenness as a ground of criminal irresponsibility. The method adopted will be comparative. First, an attempt will be made to elucidate the law of England in relation to the topic selected. Secondly, the Civil law and the legal systems of modern States will be examined with the design of showing how far their theory agrees or disagrees with our own.

Our own authorities have laid down over and over again the proposition that drunkenness is no excuse for crime, but rather enhances its criminality. "As for a drunkard," says Coke (Co. Litt. 247*) "who is *voluntarius demon*, he hath no privilege thereby ; but what hurt or ill soever he doth, his drunkenness doth aggravate it. *Omnis crimen ebrietas et incendit et delegit.*" So in Beverley's Case (4 Rep. 125) it was said, "Although he who is drunken is for the time *non compos mentis*, yet his drunkenness shall not extenuate his act or offence, nor turn to his avail ; but it is a great offence in itself and therefore doth aggravate his offence, and doth not derogate from the thing he doth in that time, and that in case as well touching his life as his goods, chattels or lands or any other thing concerning him." So Hawkins (1 P.C. c. I. s. 6). "He who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober."

Blackstone is to the same effect (4 Comm. 25). "As to artificial voluntarily contracted madness by drunkenness or intoxication, which depriving men of their reason puts them in a temporary phrenzy, our law looks upon this as

an aggravation of the offence rather than as an excuse for any criminal misbehaviour."

So far the authorities are in substantial agreement. They point to two positive conclusions. (1) That voluntary drunkenness does not excuse; (2) that the case is the same though the voluntary drunkenness amount to temporary phrenzy. The suggestion that *ebrietas crimen incendit* may be dismissed as a rhetorical flourish. If the criminality of the act is not mitigated by drunkenness neither is it enhanced. To hold otherwise would be to attach to drunkenness in itself penal consequences which in fact our law does not assign to it. Negatively the passages above cited suggest two further considerations. (a) What if the drunkenness be involuntary? (b) What if the phrenzy be not temporary but permanent? These further questions are resolved by another great authority, Sir Matthew Hale. "The third sort of *dementia*," he says, "is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary phrenzy. . . . By the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." So far Hale is in accordance with our other authorities. He continues as follows:—"But yet there seems to be two allays to be allowed in this case.

"1. That if a person by the unskilfulness of his physician or by the contrivance of his enemies eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other phrenzy and equally excuseth him.

"2. That although the *simplex phrenzy* occasioned immediately by drunkenness excuse not in criminals, yet if by one or more such practices an *habitual* or *fixed phrenzy* be

caused, though this madness was contracted by the vice and will of the party—yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes as if the same were contracted involuntarily at first.”¹

Such are Sir Matthew Hale’s allays. They require careful attention. The first excepts what may be termed involuntary intoxication produced in certain specified ways. Its scope is extremely limited. The intoxication, it would seem, must be produced by the folly or wickedness of a third person. Further the phrenzy thereby ensuing will excuse so far and only so far as it would excuse if it were symptomatic not of drunkenness but of mental disease. In other words (to incorporate the modern law herein) it must entail such a diseased condition of mind that the sufferer does not know the nature and quality of his act, or does not know that his act was wrong. In a comparatively recent Irish case, however, a new kind of involuntary intoxication was recognised by Chief Baron Palles. In the case of *Reg. v. M.R.* at the Galway Summer Assizes, 1887, the accused, a professional nurse, in a fit of raging drunkenness brought on by a small amount of alcohol had killed her patient. The jury was directed that “if a person from any cause, say long watching, want of sleep, or depravation of blood, was reduced to such a condition that a smaller quantity of stimulant would make him drunk than would produce such a state, if he were in health, then neither law nor common sense could hold him responsible for his acts, inasmuch as they were not voluntary, but produced by disease.”² Such a case is certainly not within the letter of Hale’s first allay, and scarcely within its spirit. The second exception exempts from punishment a person of permanently diseased intellect, even though

¹ 1. Hale, P.C., 32.

² Dr. Norman Kerr, *Inebriety*, 3rd ed., p. 611.

the mental disease was contracted by the vice and will of the party. Here once more, in order to excuse, the mental derangement must be attended by the conditions recognised as exculpatory in other cases of insanity.

In one respect Hale's analysis of the effects of drunkenness upon the mental state of the drunkard may be criticised as inadequate. Of three possible cases he seems to have considered only two. A man may be simply drunk. This is Hale's *simplex phrenzy*. A man may be permanently insane. This is the *habitual or fixed phrenzy* of the second allay. But suppose there is an intermediate state in which the criminal is more than drunk and yet not permanently deranged; where there is something beyond the *simplex phrenzy* of drunkenness, and yet the *phrenzy* is neither fixed nor habitual. It is possible that Hale failed to advert to such a condition. More probably he rejected it as a ground of excuse. Modern authorities may be quoted for and against the view that temporary insanity produced by drink excuses. Thus in *William Rennie's* case,¹ Holroyd, J., said "Drunkenness is not insanity. Nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong." This view of the law was followed by Manisty, J., in *Reg. v. McGowan* (Manchester Autumn Assizes, 1878) "If a man's insanity was so fixed, habitual and permanent, that it reduced him to a state of being without reason or mind, then he was not accountable or responsible for his actions. But if the prisoner's insanity was only temporary and produced by his own excesses the law did not excuse him from the results of his acts."

¹ 1 Lew, C.C. 76.

* Kerr, p. 646. Taylor & Stevenson, *Manual of Medical Jurisprudence*, 12th ed., p. 797.

Against these decisions must be set a number of recent cases pointing to an opposite conclusion. In *Reg. v. Davis*,¹ tried by Stephen, J., at the Newcastle Spring Assizes, 1881, the prisoner was charged with feloniously wounding his sister-in-law with intent to murder her. The learned judge directed the jury that "if this man had been raging drunk, and had stabbed his sister in law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing, and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case, the man is a madman and is to be treated as such, although his madness is only temporary."²

Four years later, in the case of *Reg. v. Barnes* (Lancs. Assizes, Jan., 1886), Day, J., went even further in the direction of negating imputability. According to the report in the *Times* of January 25th, 1886, "the learned judge remarked that the question was whether there was insanity or not, that it was immaterial whether it was caused by the person himself or by the vices of his ancestors; that he could not follow the decision of Manisty, J., in *Reg. v. McGowan*, and that it was immaterial whether the insanity was permanent or temporary." So far there is no advance upon the law laid down by Stephen, J., in *Reg. v. Davis*. But the learned judge added, "I have ruled that if a man were in such a state of intoxication that he did not know the nature of his act, or that his act was wrongful, his act would be excusable." According to another

¹ 14 Cox, C.C. 563.

² *Reg. v. Gemmell* was decided in the same sense before Lord Young in the Glasgow High Court, July 15th, 1893. (Kerr, p. 637.)

account, the words used were, "Whatever the cause of the unconsciousness, a person not knowing the nature and quality of his acts is irresponsible for them."

This concluding observation must rest, it is submitted, upon its own authority, for no such sweeping assertion is to be found in any other decided case. If the learned judge's view is to prevail, the time-honoured doctrine of English law that drunkenness does not excuse may as well be frankly rejected as obsolete. Now in the case under discussion "the evidence proved that the prisoner was in a wild excited state at the time the crime was committed, that he beat himself with a stick, and ran his head against the wall. He had on several occasions been under treatment for delirium tremens. He had one attack a week previously, and another two days after committing the crime." He appears to have killed his wife (the offence with which he was charged) under the delusion that she had been unfaithful to him. Nevertheless the jury found him guilty in seven minutes, and his Lordship "expressed his concurrence with the verdict." It is hard, if not impossible, to reconcile his Lordship's concurrence in the verdict with his direction to the jury.

Curiously enough Hale's failure to distinguish between drunken frenzy and temporary insanity is more in consonance with the pretensions of modern medical men than are the refinements of Mr Justice Stephen. "Why this distinction," asks Dr. Norman Kerr, "between the accountability of the intoxicated man and his unaccountability after intoxication? The insanity following drunkenness is only a further effect of drinking upon the individual."¹

What is the difference between raging drunkenness and insanity? Hale, it would seem, says "none," and holds them equally inexcusatory, provided that the insanity be temporary and induced by voluntary intoxication.

¹ Kerr, p. 591.

* Kerr. D. 648

Upon a consideration of the whole question the view that temporary insanity induced by drunkenness does not excuse must be pronounced no longer tenable. Crimes committed during delirium tremens have been frequently held unimputable although in favourable circumstances the victim of this disorder may recover his sanity in less than a week. This view of the law is enforced by the opinion of Sir Henry James, published in the *Times* of January 5th, 1892. With regard to delirium tremens he writes as follows : —“In such cases I presume that if the delirium tremens has become chronic in its effects or has so far advanced as to cause a person to lose all reasoning faculties, and not to be aware of the act he is committing, and to be unable to distinguish between right and wrong, such person is insane, and although the insanity may be temporary, the canon laid down in M’Naughtin’s case must be applied to him.”

“If once the insanity is found to exist, it will be scant justice to ignore it on account of the cause which has produced it.”

The considerations here expressed with regard to delirium tremens may be expected to guide the Courts in dealing with any other forms of alcoholic mania, should the fact of insanity be once established. But insanity must first be proved. The proposition put forward by Mr. Justice Day that drunken unconsciousness is *per se* exculpatory is not at present part of the law of England.

Before leaving this branch of the subject, it will be proper to notice the closely-connected question whether any effect and what is to be given to the temporary delusions of intoxication. Of course, the delusion may be only one indication of mental derangement, in which case the above-mentioned considerations will apply. But suppose the delusion to be itself the only indication of insanity. On

principle it would seem that the settled rule of Lunacy, as laid down in the answer to the fourth query in M'Naughtin's case, will apply. The result will be that, when the drunkard labours under partial delusions only, and is not in other respects insane, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."¹ In *Reg. v. Burns* (Liverpool Summer Assizes, 1865) the prisoner was indicted for the wilful murder of his wife. He had killed her under the idea that she was in league with men concealed in the walls. The jury acquitted him on the direction of Baron Bramwell that "though the accused might have known that the act was killing, and was wrong, he was labouring under a delusion which led him to believe that which, if true, would have justified the act." His Lordship added that drunkenness was no excuse, and that a prisoner could not by drinking qualify himself for the perpetration of crime, but that if through drink his mind had become substantially impaired a ground of acquittal would then fairly arise.² The principle here indicated would no doubt prevail over the authority of the earlier case of *Reg. v. Patteson* (Norfolk Lent Assizes, 1840). There a man, while drunk, killed his friend, who was also drunk, fancying that the latter was someone else about to attack him. He was found guilty of manslaughter on the ground that he had voluntarily brought himself into a state of intoxicated frenzy.³ But here, as before, it must be observed that the ground of irresponsibility is the existence of mental disease, of which the delusion is the proof. It does not follow that because a drunkard may justify on the ground of insane delusions, he can therefore urge with

¹ 10 C. & F. at p. 211. Kerr, p. 645.

² Kerr, p. 589. T. W. L. *Principles and Practice of Medical Jurisprudence*. Vol. II., p. 596.

³ In *Reg. v. Patteson*, however, the true principle was indicated. "It is reported that the guilt of the prisoner was made to rest upon the fact whether, had he been sober he would have perpetrated the act under a similar illusion." Taylor, *loc. cit.*

equal success the maudlin insensibility of mere intoxication. For this reason one may venture to question the authority of *Marshall's* case¹ in which Park, J., told the jury that they might take into consideration among other circumstances the fact of the prisoner being drunk at the time of the stabbing in order to determine whether he acted under a *bonâ fide* apprehension that his person or property was about to be attacked. This direction, it is submitted, runs counter to the general principle that drunkenness does not excuse. True it is that "an alleged offender is in general deemed to have acted under that state of facts which he, in good faith and on reasonable grounds, believed to exist when he did the act alleged to be an offence. But "voluntary or negligent ignorance of any such fact is no excuse for any such offence."² Ignorance induced by drunkenness must be taken to be voluntary ignorance. The good faith and reasonable grounds must be such as are found in and commend themselves to a sober man. Finally, *Reg. v. Price*³ (Maidstone Summer Assizes, 1846), which is sometimes quoted in this connection is *nilul ad rem*. Here the prisoner, who was drunk, had killed a friend who playfully sprang upon him from behind a hedge and threatened to have his life, if he did not deliver up his watch. Coltman, J, directed an acquittal, but the prisoner would have been equally entitled to an acquittal if he had been sober.

Another direction in which the doctrine of the older authorities with regard to crimes committed during intoxication has been found insufficient is when questions arise as to intention. The old rule was stated in *Keniger v.*

¹ 1 Lew, C.C., 76.

² In *Reg. v. Gamlen* (1 F. & F. 90), which was a case of assault, Crowder, J., instructed the jury to the same effect.

³ Steph. Dig., C.L. (5th ed.), art 35.

⁴ Taylor, vol. II., p. 597.

⁵ Steph. Dig., p. 29, and see 1 Hale, F.C., 474.

*Foyossa*¹ to the effect that "if a person that is drunk kills another this shall be felony and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory." Consistently with this view the English Courts have declined to admit drunkenness as a mitigating circumstance in trials for murder.

Thus in *Pearson's*² case, the prisoner was indicted for the murder of his wife. It was proved that in a fit of drunkenness he had beaten her in a cruel manner with a rake-shank, and that she died of the wounds which she received. His only defence was that he was drunk. Park, J., observed "Voluntary drunkenness is no excuse for crime." To the same effect is *Rex v. Carroll*,³ where Park, J., in the presence of Liddledale, J., dissented from a contrary opinion attributed to Holroyd, J., in the case of *Rex v. Grindley*, at the Worcester Summer Assizes, 1819.

In Scotland a different view has recently at any rate prevailed, and drunkenness, as excluding malice or deliberation, has been allowed to reduce the crime of murder to culpable homicide.⁴

Even in English law, drunkenness may be material as negating specific intention where proof of such specific intention is a necessary condition of the criminality of the accused. Thus in *Reg. v. Cruise*, where the prisoner was indicted for inflicting an injury dangerous to life with intent to murder; "although," said Patteson, J., "drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."⁵

¹ *Plowd.*, 19.

² 2 *Lew.*, C.C., 144.

³ 7 *C. & P.* 145.

⁴ *Reg. v. McKinney*, 1891 *Reg. v. McMurk*, 1891. Kerr, pp. 598-9, and see cases cited in *Wood Renton Lunacy*, p. 912.

⁵ 8 *C. & P.* at p. 546. See also *Rex v. Meakin*, 7 *C. & P.*, 297.

So a person cannot be said to have intended suicide if he was so drunk as not to know what he was about ; and when two persons, being drunk, jumped into a reservoir together and one of them being drowned, the survivor was indicted for wilful murder, Collins, J, told the jury that they had to remember that before there could be a common purpose the minds of the two persons must have been in a condition sufficiently clear to enable them to frame an intention of this kind. Drunkenness, though often said to be no defence to crime, was a material factor where proved intention was a necessary ingredient of crime, for a person might be so drunk as to be incapable of forming an intention.³

The mark which distinguishes cases of this class from cases of homicide (where the absence of intention is immaterial) consists in the fact that in the latter case the intention is raised by presumption of law, in the former it must be specifically established.

“Where from a given state of facts the law assumes a particular knowledge [and intention], or that knowledge [and intention] is a matter of necessary inference, intoxication cannot be set up. . . . But, where it is incumbent on the prosecution to make out specific knowledge of a particular fact, and where the circumstances raise no necessary inference of it, the rule might be different.”

The view of the law here expressed might be taken to be settled beyond all controversy, were it not for the language used by Stephen, J., in *Reg. v. Doherty* (Central Criminal Court, December 19th and 20th, 1887.)⁴ In charging the jury, the learned judge observed :—“ The general rule as to intention is that a man intends the natural consequences

³ *Reg. v. Moore*, 3 C. & K. 319 ; *R. v. Doody*, 6 Cox, C.C., 463.

² *Reg. v. Pugh*, Stafford Summer Assizes, 1892. Kerr, p. 625.

⁴ J. D. Mayne, *Criminal Law of India*, pp. 391-2.

⁵ 16 Cox, C.C. 306.

of his act. As a rule the use of a knife to stab or of a pistol to shoot shows an intent to do grievous bodily harm, but this is not a necessary inference. In drawing it you should consider for one thing the question whether the prisoner is drunk or sober. It is almost trivial for me to observe that a man is not excused from crime by reason of his drunkenness. . . . But, although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime. If a sober man takes a pistol, or a knife, and strikes or shoots at someone else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his drunkenness upon his intention. . . . A drunken man may form an intention to kill another, or to do grievous bodily harm to him, he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober."

This language, it is submitted, furnishes one more example of the modern tendency to refine upon the law of drunkenness in relation to criminal responsibility. It is subversive of settled principles, and cannot without corroboration be accepted as authoritative.

One more connection in which the drunkenness of the accused may be a material circumstance in determining his guilt is when it is attempted to show that he acted under the influence of passion, excited by provocation. Thus in *Rex. v. Thomas*¹ the jury was told that if a man be drunk this is no excuse for any crime he may commit, but where provocation by a blow has been given to a person

who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question whether the prisoner was excited by passion or acted from malice; as also it may on the question whether expressions used by the prisoner manifested a deliberate purpose or were merely the idle expressions of a drunken man.

"Drunkenness," said Baron Parke, "may be taken into consideration in cases where, what the law deems sufficient provocation has been given, because the question is in such cases whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation; and that passion is more easily excitable in a person when in a state of intoxication than when he is sober."

Similar language was used by Park, J., in *Pearson's case*.¹ "Drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation."

It is very important, however, in all such cases to remember that when the plea of provocation is urged two matters are to be considered: First, Was the party excited by passion? Secondly, If yes, ought he to have been excited by passion? Unless, in the first place, the accused actually gave way to a sudden impulse of anger, no question of provocation as an extenuating circumstance can possibly arise. But, next, if it does arise, it does not follow that the anger was legally justifiable. This is a matter to be decided with reference to the circumstances of each particular case, and in considering these the drunkenness of the accused may be dismissed as immaterial. The measure of justifiable anger is the measure of the prudent man, the man, that is, of ordinary temper and forbearance. This is clear from the language used by Blackburn, J., in *Reg. v. Rothwell*.² "What you will have to

¹ 2 Lew. C.C., 144.

² 12 Cox, C.C., 145.

'consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did.'¹ Drunkenness therefore, it is submitted, is material to prove provocation, but not to justify it.

We may summarise the results of a long discussion in the following propositions :—

I. Exceptions apart, drunkenness does not exclude or diminish criminal responsibility.

II. In the excepted cases the conditions of exculpation are the same as in the case of insanity.

III. The excepted cases exist where (a) the drunkenness is involuntary or (b) the drunkenness, though voluntary, is attended by permanent or temporary mental disease.

IV. In all other cases, whenever, but for the drunkenness of an accused person, certain inferences as to his knowledge or intention would be drawn from his actions, such inferences will be drawn, his drunkenness notwithstanding.

V. But "if the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk when he did the act, which if coupled with that intention would constitute such crime, should be taken into account by the jury in deciding whether he had or had not that intention."

In conclusion, we may advert to an abstract question which has troubled certain writers on Jurisprudence. When a person is punished for an act committed in drunkenness, what is he punished for? Not for the crime, it is said; because the drunkenness may exclude intention, and intention is generally a necessary element in crime. It

¹ Compare also the observation of Park, J., in *Reg. v. Carroll* (7 C. & P., at p. 146). "There is no doubt that the prisoner was in a great fury; but the question of law is, 'Was there sufficient provocation to excite it.'"

, Steph. Dig. art. 30.

follows that he is punished for his drunkenness, as some aver, or rather, as Austin¹ says, for his heedlessness. The first opinion is noticed by Hale, who observes that "according to some civilians such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby ; so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it."²

* This nicety will scarcely commend itself to the English lawyer, nor are we compelled to accept Austin's alternative. The truth of the matter appears to be that though intention be actually absent the law conclusively presumes it to exist. So in the law of contract, the Court will not allow the obvious construction of words or conduct to be denied, and there are cases in which consensus will be conclusively inferred to exist though there was no real union of wills between the parties.

R. W. LEE.

(To be continued).

¹ Vol. 1., p. 512, Lect. xxvi.

² 1 Hale, P.C. 32.

III.—USURY IN BRITISH INDIA.

THERE is probably no country in the world where the evils of Usury have attained greater dimensions than in British India. As we have seen the Mahomedan law forbade the taking of money upon loans by one Mussulman from another, and the Hindu law permitted interest to be taken only at prescribed rates¹. But the Hindu legislators expressly sanctioned, and the Mussulman Government of India appear to have tolerated, directly or indirectly, the customary interest of the country, which, in the Plan of Administration of Justice proposed by the Committee of Circuit is stated to have amounted to the most exorbitant usury.

The Indian Courts, however, do not appear, in any case which is of authority, ever to have refused to decree interest to a Mahomedan on the ground that by the Mahomedan law he was disentitled to recover it. On the whole the prohibitions of the Hedaya and the Koran appear to have been entirely disregarded for a very considerable period by the executive and those charged with the administration of justice in India².

So far as British subjects in the East Indies were concerned, in accordance with the law at home by which interest was limited to 6 per cent., no one was allowed to take more than 12 per cent. per annum on loans of money³. But the natives appear to have been left to their local customs, which were enforced in the British Courts. By sec. 10 of Regulation XV. of 1793, however, 12 per cent. per annum was fixed as the legal rate in Bengal. The Hindu rule of law known as the "*damdupat*" by which the amount recoverable at any one time for interest or arrears of interest, could never exceed the principal, became legal-

¹ L. M. & R., No. 321. p. 458, 1901.

² Harrington, Analysis.

³ 13 Geo. 3 c. 63.

ised in the Mofussil Courts by statutory enactments in the three Presidencies. In Bengal it became a statutory provision by Regulation XV. of 1793, in Madras by Regulation XXXIV. of 1802 and in Bombay by Regulation V. of 1827. The same reasons which led to the repeal of the usury laws in England operated in India and in 1855 Act XXVIII. abolished "all laws in force in any part of the said territories relating to usury."

In consequence of this provision it was held in the High Courts of Bengal and Madras after some conflict of opinion that the rule of *damdapat* no longer applied in the Mofussil courts; but in Bombay a different view was maintained by the High Court which decided that section 12 of Regulation V. of 1827 merely contained a legislative declaration of the Hindu law on the subject and that its repeal by Act XXVIII. did not affect the old customary rule of Hindu law.

Thus an anomaly was established in the administration of the law in the three Presidencies. But it did not stop here for in Bombay it was decided that although the rule of *damdapat* applied to mortgage transactions as well as to other loans, it could not be applied in cases where the mortgagee was in possession and received the rents and profits in lieu of or in addition to the stipulated interest. The result was that an honest debtor who parted with the mortgage property in the interest of the mortgagee was in a worse position than the mortgagor who retained possession.

By sect. 2 of Act XXVIII. it was enacted that "In any suit in which interest is recoverable, the amount shall be judged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate has been agreed upon at such rate as the Court shall deem reasonable."

The rate of interest, therefore, was left unlimited, and however exorbitant it might be, the Court was bound to give effect to it.

But, although the strict letter of the law was enforced in numerous instances of money-lending transactions, the Courts refused to compel the performance of agreements contracted under certain circumstances. The practice of the Courts, however, varied from Presidency to Presidency, and even in any one Presidency was not uniform. For instance, in Bengal, in 1873, interest at the higher rate of 48 per cent. was held to be in the nature of a penalty, whilst in a later case the following year¹ interest at the higher rate of 75 per cent. was held on appeal from the High Court not to be so. Again in 1877 default interest at the higher rate of 10 per cent. per month was held not to be in the nature of a penalty, but as the agreement contained a false statement of the consideration, and there was nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant and the consideration inadequate, the penalty was one which could not be enforced by a Court of Equity.²

The true principles were enunciated by Wilson, J., in the cases of *Muthura Persad Singh v. Luggun Kooc (R)*³ and *Mackintosh v. Crow*⁴ when he pointed out that there were two distinct classes of cases. In the one class the loan is for a term certain with interest at a certain rate up to due date. If repayment is not made at due date, then there is a stipulation that on default at due date, thenceforth an enhanced rate of interest shall be payable. Such a stipulation was not in the nature of a penalty, and the enhanced rate agreed upon could be recovered in its entirety. But in the other class, where the proviso is that on default of the principal at due date, an enhanced rate of interest shall become payable from the date of the bond, such a proviso was held to be in the nature of a penalty.

¹ *Bischook Nath Pandey v. Ramlochan Singh*, 11 B.L.R. 135. ² *Onda Khanum v. Brogendra Cosmar Roy*, 12 B.L.R. 451. ³ *Mackintosh v. Hunt*, I.L.R. 2 Calc. 202. ⁴ I.L.R. 9 Calc. 615. ⁵ I.L.R. 9 Calc. 689.

The matter was finally settled by a full bench in the case of *Kalchand Kyal v. Shib Chunder Roy*¹ which approved the statement of the law as laid down by Wilson, J., in *Mackintosh v. Crow*.

In the Madras Presidency and in the North West Provinces there appears to have been no conflict of view on this point. It was held in 1888 by the High Court of Madras that a stipulation for enhanced interest on default, from the date of the bond was in the nature of a penalty under sec. 74 of the Contract Act. The same view has been consistently held by the High Court of the North West Provinces² and also by the High Court of the Bombay Presidency.

The decisions upon the Equitable Doctrine in relation to hard and unconscionable bargains has not been of such a conflicting nature. In some districts, however, the very widest application and even extension of this doctrine has been given, whilst in others the doctrine has been narrowed to smaller dimensions, and in others again recognised but sparingly.

The widest application is, doubtless, that given in the North West Provinces.

In the case of *Lalli v. Ram Prasad*³, decided in 1886 the parties were an illiterate peasant proprietor and a professional money-lender. The High Court there not only adopted the principles contained in *Chesterfield v. Janssen*⁴, as applied to "catching bargains" with heirs expectants and reversioners, but to all cases in which the parties were not upon equal terms. Sir Douglas Straight, C.J., in delivering judgment, pointed out that in Lord Hardwicke's

¹ I.L.R. 19 Calc. 392. ² *Nanjappa v. Nanjappa*, I.L.R. 12 Mad. 161. ³ *Bansidhar v. Bu Ali Khan*, I.L.R. 3 All. 260; *Khurram Singh v. Bhawani Baksh*, I.L.R. 3 All. 440; *Kharag Singh v. Bholanath*, I.L.R. 4 All. 8; *Narain Das v. Chait Ram*, I.L.R. 6 All. 179. ⁴ *Sajaji Panhoji v. Maruti*, I.L.R. 14 Bom. 274. ⁵ I.L.R. 9 All. 74. ⁶ 1 Atk. 339; 2 Ves. 125.

judgment in that case there was no declaration that the equity then applied was to be limited to that class of persons only, and in support of this view he cited Lord Hatherley's judgment in *O'Rorke v. Bolingbroke*¹.

After referring to the decisions in *Aylcsford v. Morris* and *Neville v. Snelling*², the learned judge continued: "I gather therefore, according to the rule of equity laid down by Lord Hardwicke, that equitable relief of the kind described by him may be extended to the cases of 'persons under pressure without adequate protection' or to transactions with 'uneducated ignorant persons,' and that it lies upon him who seeks to fix them with a liability, which upon the face of it appears unconscionable, to establish that the contract out of which it arises was 'fair, just, and reasonable.' "

In the following year, in the case of *Madho Singh v. Kashi Ram*³, which was an action for the recovery of a loan upon a bond at compound interest, when it was found that the money-lender had taken advantage of the borrower's financial difficulties, and although under the bond he had power to sell the mortgage property at any time, he had wilfully allowed the debt to remain unsatisfied, in order that the compound interest at a high rate might accumulate, the Court held that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances, it would be unreasonable and inequitable for a Court of Justice to give full effect to. Relief was given upon payment of the principal sum with simple interest at 24 per cent. per annum.

*Chunni Kuar v. Rup Singh*⁴; and *Rajah Mokham Singh v. Rajah Rup Singh*⁵, are instances of cases in which

¹ L.R. 2 App. Cas. 814. ² L.R. 8 Ch. App. 484. ³ L.R. 15 Ch. D. 705.
⁴ I.L.R. 6 All. 228. ⁵ I.L.R. 11 All. 57. ⁶ L.R. 20 Ind. App. 127.

money was advanced on exorbitant terms for purposes of litigation. In both those cases relief was granted upon payment of the monies actually received, with simple interest in the one case of 20 per cent. and in the other of 12 per cent. per annum.

In the former case, Edge, C. J., and Tyrrell, J., declared in their judgment that the result of the English cases regarding "hard" or "unconscionable bargains" is that in dealing with expectant heirs, reversioners, or remaindermen the fact that the bargain was declined by others as not being sufficiently advantageous does not raise the presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides for an unusually high return or for an unusually high rate of interest, is a hard and unconscionable bargain against which relief should be granted.

Upon the question of the prevalence of usurious bargains between money-lenders and the ryots in this district and the disastrous consequences resulting therefrom, Sir Douglas Straight, Officiating C.J. of the High Court of the North Western Provinces, in delivering judgment in a case¹, in 1886, said, "It is bargains of this description between the small village proprietors and the money-lenders that are gradually working the extinction of the former class in many of the country districts and producing results which are not only a serious scandal but a positive mischief. For it must be borne in mind that the pecuniary difficulties of the persons I have mentioned are as often as not the result of misfortune rather than improvidence, and that bad seasons have as much to do with causing them as waste or extravagance. Whichever way it be, this is cer-

¹ *Lalli v. Ram Prasad*, I. L. R. 9 All. 74.

tain that the money-lenders, as anyone who sits in this Court must see, are to an alarming extent absorbing the proprietary interests in the village communities, and that the body of ex-proprietors is enormously on the increase."

In Bengal almost the first case of importance upon the equitable doctrine was that of *Mothoormahun Roy v. Soorendro Narain Deb*,¹ decided in 1875, in which the borrower was a lad of over sixteen years, but of full age by Hindu law, and the interest was at the rate of 36 per cent. The plaintiff was a professional money-lender. It was held that the agreement was an unconscionable one, which a Court of Equity would not enforce in its entirety. A decree for the money actually received with interest at 6 per cent. per annum was made.

In *Lall Beharechawstee v. Bholanath Dey Chakladar* the consideration was grossly inadequate, and the interest on the loan at the rate of 75 per cent. per annum. It was held that the contract was of such a nature as to involve the conclusion that the defendant was imposed upon, and was not a free agent, and that the transaction was one to which no Court could give effect. The interest was reduced to 12 per cent. per annum.

Couch, C. J., in delivering the judgment of the Court, said "It may be that there is no evidence of what might be called coercion by the plaintiff of the defendant. Nor is there any evidence of misrepresentation of fact, but the whole transaction appears to us to be of such a nature as to come within what is said by Lord Westbury, in *Tennent v. Tennents*,² where his lordship said that there may be such gross inadequacy of consideration as to involve the conclusion that the party either did not understand what he was about or was the victim of imposition. A trans-

¹ I. L. R. 1 Calc., 108.

² 23 W. R. 49.

³ L. R. 2 H. L. (Sc.) 6.

action of this kind is one which cannot be supported by a Court of Equity."

In 1876 the Judicial Committee of the Privy Council decided in the case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee*¹ that agreements in the nature of champerty or maintenance ought to be carefully watched, and when found to be extortionate and unconscionable so as to be inequitable against the party sought to be charged, or to be made, not with a *bonâ-fide* object of assisting a claim believed to be just or of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.

It may be mentioned here that the English law relating to Champerty and Maintenance does not apply in India.

Mackintosh v. Hunt, 1877, was a case of an enhanced rate of interest running from the day of default of payment of principal at due date, which stipulation was held not to be in the nature of a penalty; but it was also held that, looking at all the circumstances, the false statement as to the consideration, the want of evidence that the borrower understood the real nature of the transaction, the exorbitant rate of interest (10 per cent. per month), and the inadequate consideration, the transaction was not one which ought to be enforced by a Court of Equity. Judgment was given for the money actually received, with interest at 12 per cent. per annum without costs. The Court declared that the Calcutta Court of Small Causes was empowered to entertain equitable defences, and ought, on the facts of the case, to have given relief to the defendant.

Mackintosh v. Wingrove,² 1878, is another penalty case,

¹ I.L.R. 2 Calc. 233.

² I.L.R. 2 Calc. 202.

³ I.L.R. 4 Calc. 137.

but here it was found as a fact that the defendant was perfectly aware of the contract which she made, and consequently the principle of *Mackintosh v. Hunt* did not apply. "If people with their eyes open choose wilfully and knowingly to enter into unconscionable bargains, the law has no right to protect them." Garth, C. J., in delivering the judgment of the Court, said, "The equitable defence which formed the ground of the High Court's judgment in *Mackintosh v. Hunt* was founded upon two considerations, neither of which would have been sufficient without the other, viz. :—

- 1st. That the bargain made by Mackintosh with Hunt was grossly extortionate, and calculated to deceive an unwary young man as to its real character ; and
- 2nd. That although the other maker of the note, Norender Dutt, might have understood the nature of the transaction, it appeared that the defendant Hunt had never even read the note, and was not aware of its true meaning.

If there had been nothing unfair or unreasonable in the contract itself, and the defendant had reaped the benefit of it, the fact of his not understanding its nature would have been no valid answer to the claim.

Or, on the other hand, however extortionate the bargain might have been, if the defendant thoroughly understood and consented to it, there would have been no ground for equitable interference. It was only the concurrence of the two elements—an unequitable bargain and ignorance of the unfair nature of the transaction on the part of the defendant—which justified the Court in modifying the decree.

The decision in *Kamini Sundari Chaudhrani v. Kali Prasanna Ghose*,¹ 1885, by the Judicial Committee of the

¹ I.L.R. 12 Calc. 225.

Privy Council has been thought by some Courts in India to have narrowed the application of the equitable doctrine.

In Bombay in the case of *Kadari Bin Ramu v. Atmarambhai*,¹ 1865, it was held that a mortgage deed, which amounted to an unconscionable transaction, should stand as security only for the repayment of the money actually advanced with simple interest at the ordinary rate of 9 per cent. per annum and that in all other respects should be set aside as inequitable, fraudulent, and grossly oppressive. Mere inadequacy of consideration, unless so great as to amount to evidence of fraud, is not a sufficient ground for setting aside a contract or refusing to enforce a decree for specific performance; but when found in conjunction with any such circumstance as suppression of the true value of the property, misrepresentation, fraud, suspense, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity.

The Court were, however, careful to state that men who are perfectly cognisant of what they are doing are not to be relieved from the consequences of every hard bargain into which they had willingly entered.

There do not appear to be any other cases on these lines.

Although the reported cases upon the equitable doctrine of hard and unconscionable bargains in the Presidency of Madras are but few in number, yet at the same time they fully recognise the doctrine.

In the case of *Venkittarrama Pattar v. Keshava Menon*, 1877, the agreement for a loan was that on default, payment should be made in paddy, calculated at a certain rate. Default was made and the price of rice rose. It was held that the bargain was unconscionable upon the ground that

¹ 3 Bom. H.C. Rep. A.C. 11.

² I.L.R. 1 Mad. 349.

the delivery of the rice was not the object of the agreement but was utilised merely as a mode of computing a high rate of interest. *Buchi Remayya v. Jagapathi*,¹ 1884, was an attempt to set aside a deed on the ground of fraud made by a widow for valuable consideration immediately after her husband's death in favour of her brother-in-law. There were three questions to be decided, (1) whether undue advantage had been taken of the plaintiff's position; (2) whether the plaintiff had been sufficiently informed as to her rights or had proper advisers; and (3) whether the contract was an unconscionable or "catching" bargain.

It was held that the deed was executed by the plaintiff deliberately, and on the advice of her relations, she and they being sufficiently acquainted with all the material facts; that although she had no professional advice, it was known to her advisers what professional advice had been given; that the plaintiff herself was fully aware of the nature of the claims which she was renouncing, and that there was no proof that the arrangement was other than just and equitable.

In 1873 a Circular² which throws considerable light on money-lending transactions was issued by the Chief Court of the Punjab to all commissioners and deputy-commissioners in that district. After deploring the exorbitant rates of interest exacted upon debts incurred by peasant proprietors and cultivators, and decreed by the subordinate Courts in a manner far too indiscriminate, the Circular proceeds to explain the effect of Act XXVIII. of 1855, and especially the connection of the Indian Contract Act, 1872. By the latter Act, unless there is free consent, there is no enforceable obli-

¹ I.L.R. 8 Mad. 304.

² 11 B.L.R.H.C., Rules 15

gation, and at the same time an equitable rule is indicated which renders a contract voidable where a person who holds a real or apparent authority over another or in whom some confidence is reposed, obtains an advantage which he would otherwise not have obtained. There is the same result in the case of concealment of facts, or where acts fitted to deceive or acts or omissions may have occurred in violation of what is regarded as the legal duty of the person obtaining a promise from another to explain facts "likely to affect the willingness" of that other to enter into a contract.

The following rules are worthy of quotation in full :—

10. "The abolition of the usury laws by Act XXVIII. of 1855 has left untouched the doctrine of equity, both as to the protection of debtors who, for any real reason, are not fully competent to protect themselves, and as to the power of Courts to relieve against what are called unconscionable bargains with such persons.

11. No doubt anyone who contracts with another is entitled to assume *prima facie*, that the latter is competent to look after his own interests, but no strict rule defines, or can define, where comparative incapacity ceases, and where complete ignorance and helplessness call for the protection of the equitable rules prescribed by law.

12. No doubt, also, as a general rule, the debtor is bound to go or send to his creditor and pay him. In many contracts, however, for the loan of grain for a particular sowing (which indeed may reasonably be for the return of the grain after the harvest, at a very high rate of interest), where the cultivator fails to make payment after the harvest, a distinction may clearly be taken. Neither party originally contemplates a rate of interest only for a particular period, running on from the time of the transaction indefinitely, and in such cases the intention of the parties

with due regard to the position of the cultivator must be considered.

13. The existence of undue influence may in many cases be inferred (according to the general rules of equity jurisprudence) from the extreme imprudence of the act done when coupled with other circumstances; and in this country the relations existing between the professional money-lender and indebted peasant are such that this rule should be borne in mind by our Courts.

14. In no case should exorbitant interest be decreed in favour of a money-lender suing a peasant proprietor or cultivator or any person similarly situated (where the right to recover is disputed) unless the Court trying the case is satisfied that the stated engagement on which the plaintiff seeks to recover has been entered into by the debtor with the knowledge of all the circumstances attending his position and his liability in regard to his creditor and of his entire free will, without inequitable pressure of any kind. The Courts may consider whether or not the contract was a prudent one—not with a view to setting it aside if imprudent for that of course is entirely beside the Court's duty but with a view to determining whether extreme imprudence from which along with other circumstances, the existence of undue influence might be inferred, has or has not been manifested. Reference on this point may be made to the custom of the locality, the usage of parties similarly situated and the rates for loans prevailing, so that the character of the transaction may be tested.

The debtor need not be compelled by the Court to pay the entire amount of interest, whether agreed upon in cash or in grain if there be reason to believe that the engagement, whether evidenced by bond or by signing or making the money-lender's book or completed in any other mode, has been entered into through fear or ignorance; and if in any case the amount of interest shall appear to have been

agreed upon under circumstances which would render the awarding it contrary to the principles above referred to the Court will only decree as much interest as may appear just under the circumstances."

In 1895 an Act was passed to amend the Dekhan Agriculturalist's Relief Acts 1879 to 1886¹. By this Act it was enacted that in taking any account under sec. 13 of the Act or in any suit under this Act where interest is chargeable to an agriculturalist, such interest shall be awarded at the following rates :—

"(a) The rate (if any) agreed upon between the parties or the persons (if any) through whom they claim unless such rate is deemed by the Court to be unreasonable, or

(b) if such rate is deemed by the Court unreasonable, or if no rate was agreed upon, or where any agreement between the parties or the person (if any) through whom they claim to set off profits against interest and assessment and similar charges without an account has been set aside by the Court, such rate as the Court may deem reasonable."

The importance of this introduction of the equitable doctrine of relief in cases of hard and unconscionable bargains to agriculturalists in the Dekhan will readily be recognised by those who are acquainted with the position of the ryot, and the only matter of surprise is that the measure was not extended to the whole of India, throughout which there can be no question that the power acquired by the professional money-lender over the land and property of the peasantry, has become a very serious social and political danger.

In the same year a Bill was moved by Baboo Mohny Mohun Roy entitled "A Bill to Regulate the Award of Interests in suits for simple Money-debts and Mortgage," which enacted that—

¹ Act VI, of 1895, sec. 17.

“No Civil Court shall in any suit for a simple money-debt or a mortgage debt instituted after the commencement of this Act decree or award interest exceeding in amount the original principal or where there has been payment in reduction of the principal exceeding in amount the reduced principal.”

“Interest” was explained to mean the amount of interest due or payable at the date of the suit exclusive of payments previously made. This measure was virtually only the extension of the rule of “*damdapat*” to all persons throughout India, whoever framed the measure being apparently ignorant of the fact that this rule still obtained in the Bombay Presidency when the debtor was a Hindu.

The Bill was sent to judges and commissioners, Chambers of Commerce and Bar Councils throughout India with a request for opinions, criticisms, and suggestions.

Those opinions were in the majority of cases adverse to the proposed measure.

But, whilst disapproving of this measure, the majority of those approached approved of the object desired to be obtained, upon the grounds that the indebtedness of the land-owning classes in many parts of India, and the transfer of their property to money-lenders by the action of the law, entailed not only very serious personal hardships, but constituted a grave social and political danger.

The opinion was also general that a measure should be enacted giving the Courts power to go into the merits of all money-lending transactions, and, irrespective of the written contract between the parties, exercise their discretion in doing justice to the parties and relieving those who had become the victims of hard and unconscionable bargains.

This Bill was obviously unequal to meet the necessities of the case, and was accordingly dropped. But it served its purpose in directing public attention to a great evil,

with the result that a measure of real practical utility became law. I have already referred to the circular issued by the High Court in the Punjab advising the judges to avail themselves, in money-lending transactions, of the provisions contained in sections 16 and 17 of the Indian Contract Act, 1872. It was upon the lines of this Act that the new measure was based. As its title shows, the Indian Contract Act Amendment Act, 1899,¹ merely extends the provisions of the principal Act so as to include the class of contracts known as "unconscionable."

So important are these amendments that no apology is required for citing them in full.

For section 16 of the principal Act the following provision is substituted:—"16 (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

"(a) When he holds a real or apparent authority over the other or when he stands in a fiduciary relation to the other; or

"(b) When he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"(3) When a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

¹ Act VI. of 1899.

With the exercise of undue influence in fiduciary or quasi-fiduciary relationships we are not here concerned since this is fully provided for in English law. Neither need we stop to consider section 17 of the principal Act which merely defines "actual fraud" as we understand it in this country.

It is sub-sections (1) and (3) which claim our attention as extending the doctrine of undue influence as at present understood in this country.

Whether sub-section (1) would meet the case of an original loan contracted under the influence of bodily distress, or pecuniary embarrassment is not clear, but it is submitted that the words are sufficiently wide to cover such cases.

Amongst the examples given in the Act to illustrate these sections is the following :—

"(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence." This example is precisely analagous to *Willon v. Osborne*. In each case the money-lender was in a position "to dominate the will" of the borrower. Mr. Justice Ridley was unable to avail himself of this principle, but he might, as I contend, have applied the equitable doctrine that the parties were not "upon equal terms."

Sub-section (3) is evidently based upon the principle involved in the Sales of Reversions Act, whereby, when the inadequacy of price is so gross as to be extortionate, the presumption of fraud arises, which must be rebutted by the party who claims the benefit proving that the transaction was, in fact, fair, just, and reasonable.

Section 16 has already passed under the review of the Appellate Civil Court of Bombay. In the case of *Bhimhat*

v. *Yeshwantrao*¹ the borrower, an illiterate agriculturist, already heavily indebted to a money-lender, executed a deed of sale of his land at a gross under value. It was held that inadequacy of consideration in conjunction with the circumstances of indebtedness, necessitous position and ignorance, were facts from which a court might infer the exercise of undue influence. The court were satisfied that the money-lender was in a position to dominate the will of the borrower, and used that position to take an unfair advantage. The case was within the section, but the law as now defined did not differ substantially from that laid down by Westropp, J., in *Kadari v. Atmarambhat*.

By section 3 agreements obtained by undue influence are voidable at the option of the party whose consent to such has been so obtained.

“Any such contract may be set aside either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.”

These provisions are similar to those contained in section 1 of the English Act, and need no comment.

By section 4, section 74 of the principal Act is repealed and the following clause substituted :

“74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be the penalty stipulated for.

Explanation.—A stipulation for increased interest from

¹ I.L.R., 25 Bom., 126.

² 3 Bom., H.C. Rep., A. C. 11.

the date of default may be a stipulation by way of penalty."

Amongst the illustrations given in the Act two may be usefully cited :—

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that in default of payment the whole shall become due. This is a stipulation by way of penalty." The latter example is a very common form of a money-lending transaction in this country. If the instalments are paid regularly the rate of interest is moderate, but should default be made the rate of interest may become extortionate. It may safely be asserted that in the vast majority of cases default is made at some stage of the transaction, and it is upon this that the professional money-lender trades. In so far as he calculates upon this breakdown of the transaction, to such an extent is it a mere trick to obtain a higher rate of interest than was contemplated by the borrower. If in the above example default had been made of the first instalment, the Court would be enabled to declare Rs. 100 to be a penalty, and to reduce it to such a sum as under all the circumstances of the case would represent a fair and reasonable rate of interest upon the money actually received.

It will be observed that this action follows the decision in the case of *Kalchand Kyal v. Shib Chandra Roy*.¹

Even from the above perfunctory examination of the law relating to usury in British India, three valuable lessons may clearly be discerned. Prior to the Act of 1899, numerous attempts were made more or less successfully to

¹ I.L.R., 19 Calc. 392.

apply three principles of law to money-lending transactions. These we have seen to be the equitable doctrine of relief against penalties, the equitable doctrine of unconscionable bargains, and the doctrine of undue influence. All these doctrines are embodied and even extended in the Act.

The equitable doctrine is carried to its widest scope. ~~Where~~ one party dominates the will of the other party to the agreement, and so abuses his position, relief may be granted. Where the contract is *prima facie* unconscionable, the onus of proving it to be fair and reasonable is cast upon the party claiming the benefit. And, lastly, agreements for enhanced rates of interest may be stipulations by way of penalty against which relief will be given, agreements which, in this country, the Courts are bound to enforce according to the strict letter of the bond, notwithstanding the Act of last year.

By the adoption of these principles, the object of recent legislation might have been obtained. Were it not for the inveterate and openly avowed contempt for everything not indigenous to these islands, this apparent neglect of the Indian measure would be cause for much astonishment.

HUGH H. L. BELLOT.

IV.—NAVAL AND MILITARY COURTS-MARTIAL.

IN tracing the origin of Courts-Martial in the Army it is necessary to advert to the Court of Chivalry (*curia militaris*), which according to Coke, is said to have been the fountain of the Martial law, and the only court-military known to, and established by, the permanent laws of the land. It was formerly held before the Lord High Constable and the Earl Marshal of England, jointly, but after the extinction of the former office, it has usually with respect to civil matters, been held before the Earl Marshal only, who throughout exercised both a judicial and ministerial power, for he had not only to preside as one of the judges, but to see execution done. From the sentence of the Court of Chivalry there lay an appeal immediately to the King in person. Sir William Blackstone says that this court was in great reputation in the times of pure chivalry, and afterwards during our connections with the Continent, in the territories which our princes held in France; but in his time it had gone almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments. The jurisdiction of this court is declared by statute 13 Rich. II., c. 2, to be—"That it hath cognizance of contracts touching deeds of arms, or of war out of the realm; and also of things which touch war within the realm, which cannot be determined or discussed by the Common law, together with other usages and customs to the same matters appertaining."

Without pursuing the inquiry further as to the Court of Chivalry, it may be mentioned that though its authority was never objected to, even in criminal cases, till the post of high constable became forfeited to the Crown on the occasion of that officer, in the person of Edward Stafford, Duke of Buckingham, being attainted of high treason, in the year 13 Henry VIII., yet its jurisdiction was encroached

upon much earlier ; for by the statute 18 Henry VI., c. 19, desertion from the King's army was made felony, and by statutes 7 Henry VII., c. 1, and 3 Henry VIII., c. 5, benefit of clergy is taken away, and authority given to justices of the peace to inquire thereof, and hear and determine the same. And Rapin quotes an instance of Henry VII., having ordered those accused of holding intelligence with the enemy after the battle of Stoke, 1487, to be tried by commissioners of his own appointing, or by court-martial, according to Martial law, instead of the usual court of justice, which was not so favourable to his design of punishing them only by fines. This, however, seems to have been an avaricious, arbitrary and illegal exercise of power, not authorised by any law of the land.

From the time that the Court of Chivalry was abridged of its criminal jurisdiction by the suppression of the post of High Constable until the Revolution, there appears to have been no regular established court for the administration of Martial law. For although the Earl Marshal still continued to hold the Court of Chivalry, yet its jurisdiction was confined to civil matters ; and there are instances during that period of other courts being erected for the administration of Martial law, and not only military persons made subject to it but many others punished thereby, some entirely at the discretion of the Crown, and others by the appointment of the Parliament only ; and so repugnant to the spirit of liberty were such commissions regarded that we find in the Petition of Right, 3 Chas. I., c. 1, one clause to the effect that the commissions for proceeding by Martial law should be dissolved and annulled, and no such commission be issued for the future. Though undoubtedly these commissions were unconstitutional, yet the necessity of subordination in the army, and the impossibility of establishing that subordination without Martial law, soon

became apparent; and the two Houses of Parliament, in the beginning of their rebellion against Charles I. passed an ordinance appointing commissioners to execute Martial law. This ordinance was passed in 1644, and afterwards renewed by the Parliament, and in process of time adopted as a model for the Mutiny Act passed after the Revolution. From these commissions, granted by the Crown, gradually arose a new form of military tribunal, under the denomination of a Court or Council of War, which sat at stated times under an officer of a certain rank, who was styled the President.

The transition from a Council of War to Courts-Martial in their present form was a matter more of name than of substance. The exact time at which courts-martial under that name began to be held is not ascertained, but they are mentioned with the distinction of general and regimental courts-martial in the Articles of War issued on the outbreak of the Dutch War, in 1672, by Prince Rupert, as Commander-in-Chief, under the authority of a commission from Charles II. There was this difference between the earlier courts-martial and the military courts-martial of the present day, that in the earlier courts the general or governor of the garrison who convened the court ordinarily sat as President, and that the power of the Court was plenary and their sentences were carried into execution without the confirmation required under the present law.

Before the establishment of a standing army no necessity existed for a military code in time of peace; but, when after the Restoration in 1660, such a force was established, the necessity of special powers for the maintenance of discipline began to be felt. In 1662 Charles II. issued Articles for the government of his guards and garrisons, but offences involving the penalty of death were expressly reserved for trial by the known laws of the land, or by special commission under the Great Seal by the advice of

the judges and lawyers. In April, 1689, the first Mutiny Act received the Royal Assent. This Act was prefaced by a preamble declaring the necessity for and the objects of the Act in terms which were repeated without substantial alteration in each subsequent Mutiny Act until the year 1878, and have now been transferred to the preamble of the annual Act bringing the Army Act into force. Power was given to their Majesties, William and Mary, or the general of their army, to grant commissions for summoning courts-martial for punishing such offences, and it was further provided that the Act should not extend to the Militia and should not exempt any officer or soldier from the ordinary process of law. Successive Mutiny Acts, with the exception of certain short intervals, were subsequently passed annually from the year 1690 to the year 1878. In the year 1879 the Mutiny Act and Articles of War were consolidated in one statute, viz., in the Army Discipline and Regulation Act, 1879. Two years later the Army Discipline and Regulation Act, 1879, was repealed, and re-enacted with some amendment in the Army Act, 1881. The Army Act has of itself no force, but requires to be brought into operation annually by another Act of Parliament, thus securing the constitutional principle of the control of Parliament over the discipline requisite for the Army. These annual Acts afford opportunities of amending the Army Act, of which considerable use has been made.

The most ancient code of regulations for the government of the Navy is that of Richard I. when he marshalled his great fleet for the Holy Land. In a council of nobles he chose and appointed certain great officers to be justiciaries over the combined Navy of England, Normandy, Brittany and Poictou, and delivered his charter to them as follows (Roger of Wendover, *Chronicles*):—"Know, all men, that we, with the aid of upright counsellors have

laid down these ordinances ; whoever shall commit murder aboard ship shall be tied to the corpse and thrown into the sea ; if a murder be committed on land, the murderer shall be tied to the corpse and buried alive ; if any man be convicted of drawing a knife for the purpose of stabbing another, or shall have stabbed another so that blood shall flow, he shall lose a hand ; if a man strike another with his hand, he shall be ducked three times into the sea ; if any man defame, vilify, or swear at his fellows, he shall pay him as many ounces of silver as times that he has reviled him. If a robber be convicted of theft, boiling pitch shall be poured over his head, and a shower of feathers shaken over to mark him, and he shall be cast ashore on the first land on which the fleet shall touch." And all the crews were sworn to observe these constitutions, and to obey the commands of the justiciaries. Similar punishments for similar offences subsisted in the Navy for many centuries afterwards, re-ordained on the fitting-out of each successive expedition. A permanent Court of Justice was held under the authority of each High Admiral, for the trial of sea cases, both for life and goods, and its jurisdiction in some cases defined by statute. But as there was no standing Navy during the thirteenth, fourteenth, fifteenth and part of the sixteenth centuries, so there was no fixed code of naval law. Fleets were raised on emergencies for the public service, and the greater part of the ships furnished by private enterprise, the remainder bought up for the occasion, and fitted out by the Crown. When the expedition was ready, the Lord High Admiral, or the actual commander-in-chief, by authority delegated from him, issued specific instructions to the admirals and captains, for the punishment of offences and general maintenance of discipline, limited to the particular services. In this manner precedents grew up, and the same forms as applicable to similar circumstances were ordinarily reproduced. The summary powers granted

to the commanding officers were very great. Sprung from absolute authority, they were distinguished by its usual characteristic—extreme severity.

Naval punishments "according to the custom of the sea," which was extremely barbarous, were much the same in the sixteenth century as they had been in previous ages; but in the account of Drake's dealings with Thomas Doughty in 1578, and with Captain William Borough and the other mutinous people in the *Golden Lion* in 1587, we have indications of the gradual evolution of the court-martial, and of a more just, if scarcely less severe, administration of military law. Doughty, charged with a plot against Drake's life, was brought before a body of officers, who hearing him confess himself guilty, as is alleged, unanimously signed the sentence by which he was condemned to death. Borough, convicted before "a general court holden for the service of her Majesty aboard the *Elizabeth Bonaventure*," was, with his abettors, sentenced *in contumaciam*, "to abide the pains of death" in case of their being caught. "If not, they shall remain as dead men in law."

Naval law may be said to have received its first codification under the Commonwealth. Disciplinary instructions had been previously issued to their fleets by particular commanders upon particular occasions. These instructions, however, lapsed with the various occasions which called them into being. Rules of the kind for the government of the Earl of Warwick's fleet were passed by the Commons in March, 1649, and on December 25, 1652, a modification of these rules was enacted for the government of the whole Navy. These were the first regular Articles of War, and are the groundwork of all subsequent modifications and additions experience has shown to be necessary down to the present day. There were thirty-nine of them, thirteen prescribing death, and twelve more

prescribing either death or a lighter punishment alternatively, according to the views taken by the Court of War trying the offender. But though the code was then, on paper, extremely severe, it was enforced with mercy and discretion ; and up to the time of the Restoration there is no known instance of a death sentence, pronounced under it, having been carried out. Even the fomenters of mutiny escaped. Three men of the *Portland*, convicted of this most serious offence, or of having incited to it, in 1653, when the country was at war, were let off with the comparatively light though very cruel penalty of having to stand for an hour with their right hands nailed to the mainmast of the flagship, and with halters about their necks. Three of the mutineers received only thirty lashes apiece.

In 1749, "the laws relating to the government of his Majesty's ships, vessels, and forces by sea," were consolidated. The principal amendments introduced were :— The administration of an oath of secrecy to members of courts-martial ; an extension of jurisdiction in the case of spies, as well as of offences committed by crews of ships-of-war on shore in any place out of his Majesty's dominions. In 1847, the sanguinary enactments of the last century were modified, and a discretionary power given to naval courts-martial to award a mitigated sentence in the case of all capital crimes except murder and sodomy. The Naval Discipline Acts of 1860, 1861, 1864, and 1865 are repealed, and the Act in force at the present time is the Naval Discipline Act of 1866, as amended by the Act of 1884. The consolidated law of the Navy is by this Act brought into due conformity with the law of the land ; but a necessary distinction must always exist, for the direct maintenance of discipline, among bodies of men massed together in ships of war, demands for the most part absolute authority in the commanders and absolute

subordination in the seamen. "The salvation of the country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends and harmless to the enemy." (*Sutton v. Johnstone*, 1 T. R. 549, *Per* Lords Mansfield and Loughborough).

But discipline is not a power that can stand by its own strength alone; the abuse of the name has often been the bane of the service. In times past many captains broke the spirit of their crews by petty tortures and petty persecutions—punishment, in fact, where no punishment was due; there was no escape from tyranny within the narrow confines of a ship. The wellbeing of the Navy depends on the good feeling and attachment of the sailor. Martinets may say that without rigour of discipline there can be naught but laxity of discipline; yet there is a mean, known to officers with a faculty for command: ships, in which duty is well carried out by willing men, and certainty of punishment the unfailing doom of the disaffected and really criminal. (*Man. Nav. Law*, 1901, p 37).

MILITARY COURTS-MARTIAL.

The descriptions of court-martial before which a prisoner, whose case is too serious to be disposed of summarily by the commanding officer, can ordinarily be brought, are three:—(1) A regimental court-martial; (2) a district court-martial; and (3) a general court-martial.

None of these tribunals has the power to try any person unless he is subject to military law as provided by the Army Act. But each of them has under the Army Act complete jurisdiction to try any military offence whatever, committed by a person so subject to military law, the difference between their powers consisting in the extent of punishment which each tribunal can award, and in the incapacity of the inferior tribunals to try officers and persons in the position of officers. Thus a *regimental court*

martial cannot award a heavier punishment than forty-two days' imprisonment, and cannot discharge a soldier with ignominy; nor can it try an officer or warrant officer, or a person subject to military law who does not belong to his Majesty's forces. A *district court-martial* cannot award any punishment higher than two years' imprisonment, and cannot sentence a warrant officer to any punishment except dismissal, or such suspension or reduction as is mentioned in section 182 of the Army Act, and cannot try an officer. A *general court-martial* alone can award the punishments of penal servitude and death, and is the only court to try an officer.

There is another kind of court-martial, termed a *field general court-martial*. This court has the same power as a *general court-martial*, including the power of trying an officer, and is convened in an exceptional way (no warrant being required), and is subject to exceptional rules, under which the procedure is of a more summary character than that of an ordinary court-martial. This court can only be convened on active service or abroad for the trial of offences which it is not practicable, with due regard to the public service, to try by an ordinary general court-martial. If troops are not on active service, the power of convening it is further limited to cases of offences committed by persons under the command of the convening officer, and of offences against the person or property of some inhabitant of, or resident in, the country. This court must consist of not less than three officers, unless the convening officer is of opinion that three are not available, in which case it may consist of two; but in the latter case it cannot award any sentence exceeding imprisonment or summary punishment. A sentence of death requires the concurrence of all the members.

The legal minimum number of members on a *regimental court-martial* and on a *district court-martial* is three; while

on a *general court-martial*, in the United Kingdom, India, Malta and Gibraltar it is nine; and elsewhere five. Every member of a *regimental court* must have held a commission for a year. Every member of a *district court-martial* must have held a commission for two years. Every member of a *general court-martial* must have held a commission for three years, and if the court is to try a field officer (*i.e.*, from a major upwards), must not be under the rank of captain.

When a prisoner is brought before a court-martial he is asked whether he objects to be tried by the president or any of the officers appointed to form the court. If he does so object, he will be asked to name all the officers to whom he objects, and the grounds of his objection. After the disposal of any objections made by the prisoner the court is sworn, if there is a judge-advocate, by the judge-advocate, and if not by the president, the president being sworn by some member of the court who has been previously sworn.

The prisoner is allowed to have a friend to assist him, who may be either a legal adviser or any other person. If the friend is not a barrister, a solicitor, or an officer subject to military law, he can only advise the prisoner and suggest questions to be put by the prisoner to witnesses: but if he is a barrister, a solicitor, or any officer subject to military law, he has the rights and duties of counsel. Formerly counsel, though they could appear as advisers either of the prosecution or the defence, could not address the court or examine witnesses orally. But now, by Rules of Procedure, 88-94, counsel who appear on behalf of either prosecutor or prisoner, have the same rights as to addressing the court, examining witnesses, and generally as the persons whom they represent. All questions are put to the witness direct by the prosecutor, prisoner, or judge-advocate, but the witness in replying addresses the court, and not the prosecutor.

or prisoner. Formerly questions were not put direct to a witness, but through the president. The questions are put down in writing by the judge-advocate if there be one, or by a member of the court, and underneath each question the answer is written. The evidence of every witness must be read over to him before he leaves the court, and he may offer, or be called on by the court, to explain or to reconcile answers which may appear inconsistent. The examination of witnesses is conducted somewhat after the manner of an ordinary criminal trial. A prisoner may give evidence on his own behalf. After all the evidence has been taken, and the speech for the defence made, the prisoner is marched out, and the court closed to deliberate on their finding. The court may at any time during the trial deliberate in private, and may either withdraw for that purpose or cause the court to be cleared; but at other times the court must be open to the public, military or otherwise, so far as the room or tent in which the court is held can receive them.

The court must consider their finding in closed court, and the opinions of the members are taken in order beginning with the junior in rank. The court is again reopened, and the prisoner is marched in. If the verdict is one of acquittal, the court pronounce their finding in open court, and the prisoner is discharged. If, on the other hand, the court find the prisoner guilty, they do not state in open court what their finding is, but the prisoner knows what it is, by the President putting to the prosecutor the question: "Have you any evidence to produce as to the character and service of the prisoner?" If he has, he replies, "I produce this paper, sir; shall I read it?" He then proceeds to read extracts from the prisoner's default sheet, and states how many times before the prisoner has been dealt with by a court-martial or his commanding officer. The prisoner is again marched out, and the court

is closed to consider the sentence. The junior member is asked first, and so on in seniority. The majority decide the sentence. The papers are then placed in an envelope, sealed up, and despatched to the confirming authority. A prisoner may not know for several days what he has been sentenced to, for he is not told until the sentence has been confirmed.

The authority having power to confirm the finding and sentence of a court-martial may send back such finding and sentence, or either of them for revision once, but not more than once, and it shall not be lawful for the court on any revision to receive any additional evidence ; and where the finding is only sent back for revision, the court shall have power without any direction to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial on revisal of the sentence, either in obedience to the recommendation of an authority, or for any other reason, have the power to increase the sentence awarded. (Army Act, s. 54, subs. 2). If the Court adhere to their finding and sentence, the confirming authority can only either confirm or refuse confirmation. A conviction and sentence are not valid until they are confirmed, and therefore a refusal of confirmation in effect annuls the whole proceeding, except where confirmation is withheld wholly or partly for the purpose of referring to superior authority. The confirming authority can, when confirming the sentence, whether after revision or without it, mitigate, remit, commute, or suspend the punishment. After confirmation, the punishment can only be mitigated, remitted, or commuted by the Sovereign.

After the sentence of a district or general court-martial has been confirmed, the papers are sent to the office of the Judge-Advocate-General of the Army, where they are perused, and should any illegality in the proceedings be detected, the sentence is quashed, but meanwhile the

prisoner has probably undergone a portion, if not the whole, of the sentence (in case of a short one), as some weeks must necessarily elapse before the proceedings are reviewed by the Judge-Advocate-General. Where the conviction is quashed, the prisoner is re-instated in his former position.

NAVAL COURTS MARTIAL.

The Navy differs from the Army in that it has only one kind of court-martial, and that is a general court. Naval courts are held on board one of His Majesty's ships or vessels of war, and like military courts are open to the public. If the conduct of any person in the presence of a court martial be so disorderly as to amount to an interruption or obstruction of its proceedings, the court has power to order him to be excluded from the court, or in glaring cases to commit the offender (whether belonging to the navy or a civilian) for contempt. The procedure is somewhat similar to that of the Army. The deputy judge-advocate is generally a paymaster. A court-martial must consist of not less than five or more than nine officers. No officer may sit on a court-martial who is under twenty-one years of age. In the Army it is regulated by the number of years service. A person assisting a prisoner may advise him on all points, may suggest the questions to be put to the witnesses, and may read the prisoner's defence, or statement in mitigation of punishment, but he is not to address the court (Adm. Instructions 633). This was formerly the practice of military courts, but now in military courts a legal adviser or an officer may ask questions of a witness direct, and may address the court, although a civilian friend can only assist the prisoner by suggesting questions.

Any member of a naval court-martial may ask a witness a question without the intervention of the President, but the question is recorded as having been asked by the court.

In the army the practice is different ; every question put by a member of the court to a witness is put through the President, and not direct to the witness. I believe there is nothing in the Army Rules of Procedure to warrant the practice, although I have been informed on high military authority that the rules enjoin it. The Rules of Procedure are as follows :—(83A) “ Every question may be put to a witness orally by the prosecutor, prisoner, or judge-advocate, without the intervention of the court, and the witness will forthwith reply, unless an objection is made by the court, judge-advocate, prosecutor, or prisoner, in which case he will not reply until the objection is disposed of.” Rule (85A) “ At any time before the time for the *second address* of the prisoner, the judge-advocate, and any member of the court, may, *with the permission of the court*, address *through the President any question* to a witness.” Rule (41C) “ After the evidence of all the witnesses for the defence has been taken, the prisoner may again address the Court, and the time at which his second address is allowed is in these rules referred to as the time for the *second address* of the prisoner.” In a note to Rule (85A) it states that “ any question ” means, in this rule and the next, any question which might have been put to the witness when first called. Any question put by a member of the court or judge-advocate will ordinarily be more conveniently put after the examination of the witness by the prosecutor and the prisoner is concluded, but before any other witness is called.” Rule (83A) clearly refers to the questions put on the first calling of a witness, and Rule (85A) refers to the case where a witness is recalled and examined ; in the latter case questions put either by the judge-advocate or any member of the court must be put through the President. Rule (83A) distinctly states that the judge-advocate may put questions without the intervention of the court, and Rule (85A) states that questions put by the judge-advocate must

be put through the President, clearly referring to two different occasions. The same rule will, of course, apply to a member of the court.

Like as in the military courts, the court is cleared for the consideration of the finding, and the junior member records his vote first, the votes of the majority deciding the issue, except in the case of a sentence of death, which is provided for by sub-section 2 of section 53 of the Naval Discipline Act. When, on a division, the votes are equal, the construction most favourable to the prisoner is to prevail. Judgment of death shall not be passed on any prisoner unless four at least of the officers present at the court-martial, where the number does not exceed five, and in other cases a majority of not less than two thirds of the officers present concur in the sentence. Except in cases of mutiny the punishment of death shall not be inflicted on any prisoner until the sentence has been confirmed by the Admiralty, or by the Commander-in Chief on a foreign station (s. 53). The sentence of a naval court-martial does not require confirmation as in the Army, with the one exception of a sentence of death. In the Navy the sentence is at once proclaimed in court. This is a much better and fairer procedure than that adopted in military courts. It is unfair to keep a prisoner in suspense for some time, until the sentence has been confirmed. The better plan would be to deliver the sentence in open court, and leave the confirming authority to reduce it if thought necessary.

SOME SUGGESTED REFORMS.

A court-martial is composed of a number of officers who, for the most part, have little acquaintance with legal business, and who are mainly dependent for their notions of law upon the assistance of a deputy-judge-advocate, where there happens to be one. A person called upon to discharge the onerous and multifarious duties rarely has had the advantage of a legal education or training, and

although, compared with ordinary military officers, somewhat experienced in such matters, he cannot be supposed to be so well versed in them as he would if they were part of his ordinary professional duties. On all district courts-martial where prisoners are charged with serious offences, a lawyer ought to be appointed to act as judge-advocate, and on every general court-martial a lawyer ought most certainly to sit as judge-advocate. It is absolutely impossible for officers unacquainted with the practice of the law to understand all its intricacies, and, considering that London police magistrates and stipendiary magistrates throughout the country who are men well versed in the law, can only give a few months imprisonment, it is not safe to place in the hands of men, usually ignorant of the law, such enormous power over the lives and liberties of their fellow men, unless there is at least some qualified lawyer on the court to guide it. It would, perhaps, be an advantage to have a staff of qualified presidents attached to each district, men who have passed in military law, and, by continually discharging such duties, they would soon acquire a fair practical knowledge of their duties. But even were this done, one would still like to see lawyers appointed as judge-advocates in serious cases, or cases in which long terms of imprisonment are likely to be given. In some continental countries they have lawyers called "auditors" attached to each district, who sit as judge-advocates.

Because no flagrant case of injustice by a court-martial has happened recently, it must not be supposed that no case could arise, or will ever arise again in these enlightened days. Sufficient instances of acts of injustice done by military courts in the past may be found in the "Manual of Military Law 1899," and the "Manual of Naval Law and Court-martial Procedure, 1901." Such cases may at any time recur again, unless these Courts

have some independent legal adviser to guide them. Military men, as a rule, have a great dislike to lawyers, but a qualified lawyer as judge-advocate is far better than a military judge-advocate for many reasons, more particularly for the two following: (1), because the lawyer has a wider knowledge of the general law and the application of the rules of evidence, and (2) because a lawyer is independent, he is not so likely to be overawed by the President of the court. A military judge-advocate is invariably of inferior military rank to the President of the court, and he would scarcely be inclined to press his point so strongly to the President as a lawyer would. Accustomed to obey the command of a superior officer, without questioning it, he would not with a haughty officer as President dare to stand out firmly for his opinion. And this is one of the strongest arguments against appointing a military judge-advocate.

Another great defect in courts-martial is that the members forming the court come too much in contact with the witnesses, for the prosecution or defence, during the course of the trial, and in cases which have caused great notoriety, they cannot bring such an impartial mind to bear on the issues before them, as a lawyer would under the circumstances.

Having given a brief sketch of the origin of naval and military courts-martial, and their procedure at the present day, with suggestions for their improvement, we will conclude with a short summary of the procedure in military courts of Continental countries. Further information on the law of the Continent may be found at the end of Lt.-Colonel Tovey's admirable little book, on *Military Law*, and in "*Fonctionnements de la Justice Militaire dans les differents Etats de l'Europe*," par J. Gran, Auditeur de Brigade, Christiana and Paris, 1885. See also "*Code de Justice Militaire*."

THE MILITARY LAW OF FRANCE.

The *Code de Justice Militaire* contains the laws relating to the French Army. It lays down the different Military Tribunals for times of peace, of war, and of a state of siege. It determines the rules of procedure, specifies the crimes, and enacts their punishment. Military justice is administered by—1, *Conseils de guerre*; 2, *Conseils de révision*; 3, *Prévôtés*.

The *Conseils de guerre*, who judge accused persons, act as a jury, and are also supreme judges of *points of fact*. The *Conseils de révision* either maintain or annul the judgments of the *Conseils de guerre* in the same manner as the *Cour de Cassation* of the ordinary law. They are supreme judges of *points of law*. *Prévôtés* are only established in time of war on foreign territory, and can only judge followers of the Army for certain given offences.

Conseils de guerre are formed permanently at the chief place in each territorial *circonscription*, others being also formed if required. The Government fix the place and times of meeting, a provision found to be of great disadvantage during the siege of Paris. The General Commanding each *circonscription* keeps prepared and corrected to date, a list of all officers who can be called to sit on the *Conseils de guerre*. These officers are to be fit by instruction and experience to fill these functions, to be able to sit without injury to other requirements of the service, and to live sufficiently near the place where the *Conseil de guerre* sits. These permanent councils are composed of a president and six judges, named by the General Commanding, except in the case of a Colonel, General Officer, or a Marshal of France, when the nomination is by the Minister of War. The rank of the members varies according to the rank of the accused. To each Council of War is attached an officer acting as Commissary of Government, an officer acting as *Rapporteur* or prosecutor, and one or

more clerks. When an army is in the field, one or two Councils of War are established in each Division or Detachment, and at the headquarters of the Army, and if necessary at that of each Army Corps. These councils are composed of a president and only four judges, similar in rank to those of the permanent councils, no more than two officers ever to be of a rank inferior to the accused. To each of these councils is attached a Commissary of Government, acting at once as Commissary and prosecutor, and a clerk.

Permanent Councils of Revision are established in every territorial *circonscription*, their number, seat, and assembly being determined by decree of the Chief of State, published in the *Bulletin des Lois*. They are composed of a Brigadier-General as President, and four judges; namely, two Colonels or Lieutenant-Colonels, and two Chiefs of battalions or squadrons, or Majors. These are taken from the officers in active employment in the *circonscription*, and can be replaced every six months. A superior officer acting as Commissary of the Government, appointed by the Minister of War, and a clerk, with assistants if necessary, are attached to the Council. When a decision has to be made on the judgment of a Council of War, which has been presided over by a General of Division, or a Marshal of France, the Council of Revision must be presided over by an officer of equal rank. The right of condemned prisoners to appeal to the Court of Revision can be suspended with armies in the field by a decree of the Chief of the State, and in besieged places by the Commandant.

When an army is on foreign territory, the Grand Provosts and Provosts exercise a jurisdiction independently of their police duties. The Provosts and Grand Provosts judge alone, assisted by a clerk, whom they choose from among the *sous-officiers* or brigadiers of gendarmerie. They can award for infractions of regulations respecting dis-

cipline, punishment not exceeding two months' imprisonment. For other offences, punishment of six months' imprisonment. Their decisions are not subject to appeal.

All the judgments of Councils of War can be referred to the Councils of Revision either by the prisoner or at the request of the Commissary of the Government. The Councils of Revision can only annul judgments in the following cases:—1. When the Council of War has not been composed according to the dispositions of the Code. 2. When the rules of *compétence* (jurisdiction) have been violated. 3. When the punishment pronounced by the law has not been applied to the facts declared certain by the Council of War, or when a punishment has been pronounced beyond those provided by the law. 4. Where there has been a violation or omission of the forms prescribed on pain of nullity. 5. Where the Council of War has omitted to pronounce respecting a demand of the accused, or a requisition of the Commissary of the Government to use a power or a right allowed by the law.

THE MILITARY LAW OF GERMANY.

In Germany no soldier can be tried by a Civil Court, but is subject to similar punishment by Court Martial, and for this purpose a lawyer, called an "Auditor," is attached to each Division, on whom devolves the duty of expounding the law to the members of a Court-Martial.

A General Court Martial, or *Krieg Gericht*, is convened by the officer commanding the Division. It is composed of five classes in case of a private—(a) A Field Officer as President; (b) two captains; (c) two lieutenants; (d) three non-commissioned officers; (e) three privates. As the military rank of a prisoner increases so do the members of the Court-Martial-class (e) representing the rank of the man to be tried.

Stanz Gericht, or Regimental Court-Martial, is ordered by the Colonel commanding the regiment, and is composed

of five classes under the presidency of a captain. Only privates and non-commissioned officers can be tried by it. In every regiment there is an officer called the *Untersuchungs fuhrenden officier* who, like the auditor, collects the evidence and reads it to the members. This officer receives a small increase of pay and has to take an oath to perform the duty allotted to him impartially, &c. The proceedings otherwise are as with General Courts-Martial. The evidence is collected by the auditor, in the presence of the prisoner, who can cross-examine the witnesses or have them cross-examined by a friend. The witnesses are under oath when giving evidence. An officer is also present, whose duty it is to protect the prisoner's interests while the evidence is being taken. When the Court-Martial assembles, the auditor reads out the whole of the proceedings in the presence of the prisoner, who, at the conclusion, is asked if he has anything to say. The auditor then explains to the members the legal points of the questions, and what punishment the law lays down for the offence. The members then consult together by classes, and give their verdict, which must be unanimous as far as each class is concerned. Supposing the non-commissioned officers and privates vote one way, and the captains and lieutenants another way, then the vote of the President decides the punishment.

In the German Army there is also another kind of court, termed a "Court of Honour." Its object is declared to be to maintain honour, the common heritage of the corps of officers, and that of each of its members.

THE MILITARY LAW OF RUSSIA.

Every body of troops whose commander exercises the power of a Regimental Commanding Officer has its Regimental Court. Every military district has its district court at the district head-quarters. The Supreme Court

at St. Petersburg hears appeals from the verdicts of the lower courts.

A Regimental Court consists of a field officer as president ; two company officers as members ; and a judge-advocate assists. Regimental staff-officers, or officers under two years' service, are not eligible as members. The Commanding Officer of the regiment, &c., appoints the president for one year, the members for six months ; the names are submitted to the Divisional General, who has the right to veto.

Military District Courts are composed of the following :—President, is a General or a Colonel ; permanent members, are two field officers and two military procurators ; the temporary members are two field officers and four company officers appointed from regimental officers by the General Officer Commanding for six months. Officers of the special arms, or of the staff, or of less than eight years' service, are ineligible as temporary members. District Courts may try all cases, and may hear appeals from the Regimental Courts.

The Supreme Court at St. Petersburg is the final Court of Appeal. It consists of a President and four members, all generals or other high military functionaries. The Judge-Advocate-General is attached to this Court. The verdict of Russian Courts-Martial is signed by all the judges, and at once communicated to the prisoner, who has the right of appeal within twenty-four hours. The verdict must be submitted to the convening officer within three days. He may confirm it, send the case up to a higher court, or increase or reduce the amount of punishment within the limits assigned by law.

THE MILITARY LAW OF ITALY.

In Italy no person can be a member of a Court of Inquiry or of a Military Court under twenty-four years of age. The Military Territorial Tribunal consists of one Colonel

or Lieut.-Colonel as President and five judges, of which two must be field officers and the remainder captains. Such Tribunal has attached to it a Court of Inquiry, an officer of high rank to act as "Instructor," a Military "Fiscal-Advocate" or Judge-Advocate; and a defending counsel, either an officer or lawyer. The Military Tribunals sit at the head-quarters of their territorial division, with some exceptions.

The other Courts are "The Officers' Tribunal," "The Officers' Tribunal in the Field," and "The Supreme Naval and Military Tribunal." The last mentioned Court has a General of high rank as president, eight actual judges (three Generals, three State Councillors, and two Presidents from the Court of Appeal), and five supernumerary Judges (two Generals and three State Councillors). It sits in the capital of the country.

Special Military Courts are formed in exceptional cases, and in war time, when a commander of high rank is obliged to make an example on the spot in the interests of discipline. They are composed of a President and five judges, one State lawyer, one instructor, and one defending counsel. When death by shooting is awarded by this court, the sentence has to be carried into effect at once.

Military Tribunals, except the discipline commission, are all open Courts. The votes are taken successively, beginning with the junior, and a simple majority decide; should the number of votes be equal on both sides, the milder or more favourable form of sentence is given. The sentence, which is at once made public by the President without further confirmation by any particular judge, must be carried into effect within twenty-four hours, unless appeal is made to a higher Court. The higher Courts confirm, quash, or order the case to be sent to another Military Court to be retried. In the latter case, the Royal Court of Cassation, or Court of Appeal, is the Court implied.

A COMPARATIVE ABSTRACT OF FOREIGN MILITARY LAW.

In Bavaria and Switzerland, a military jury is attached to the court-martial. In Russia and Bavaria, several military juris-consults are admitted to the Courts: in Russia three; in Bavaria two or three, according to circumstances. These officials are always permanently nominated. The States where under-officers, corporals, and privates sit as judges on courts-martial, are Norway, Denmark, Germany, Wurtemberg, and Austria-Hungary. In France, Servia and Turkey an under-officer is admitted, but never a private soldier.

Military judges are named for a single sitting or trial in Norway, Denmark, Sweden, Finland, Belgium, England, Germany, Wurtemberg, Austria-Hungary, Switzerland, Spain, and the United States. In Holland, the same officers usually act on Courts-Martial for a month. In the other States, the military judges are named for a given time, more or less long, the ordinary duration being six months. In Italy they sit for two years; in Greece and Bavaria one year; in France, Servia, Roumania, Turkey and Russia, for six months; in Portugal for four months.

The number of members composing a Court-Martial varies much, and is in some cases regulated according to the case to be tried, great offences requiring a greater number of judges than minor ones. The number most common is seven; that is the number laid down in Holland, Belgium, France, Spain, Portugal, Greece, Turkey, and also in Wurtemberg, but in the latter country for minor cases it may be reduced to five. The number of five judges is the rule in all cases in Sweden, Finland, Servia and Roumania. In Norway and Denmark the number is highest. In all cases concerning accused persons, from private soldiers up to the rank of captain, it must be thirteen; when the accused is an officer of superior rank, the number should legally be twenty-five, but in such cases

a military commission composed of four members, three officers and an auditor, usually takes the place of the Court.

In France, Switzerland, Italy, Spain, Portugal, Roumania and Greece, the accused may choose his defender, either a military man or an advocate. In Bavaria, if the offence to be tried is against the ordinary law, the defender must always be an advocate, but if the case is purely military, the accused has the power of choosing a defender from among the officers and officials attached to the army. In Germany, the accused can, in grave cases, be defended by a military man, if the offence is of a military nature; by an advocate, if the offence is a civil one; and if the crime entails capital punishment, it is the duty of the competent authority to provide the accused with a defender.

J. E. R. STEPHENS.

V.—OBITUARY : MR. JUSTICE MURPHY.

THE late Mr. Justice Murphy, who passed away, to the sincere sorrow of the Irish Bench and Bar, on the 5th September last, was a man of great and varied parts. An admirable classical scholar, a great student of English literature, an orator of the highest order of forensic eloquence, a man of simple tastes, a lover of country life and pursuits, a genial and gifted conversationalist, a highly cultured and well-read man, it was little to be wondered that the possessor of so many gifts and graces was so universally popular and respected.

His career at the Irish Bar was more marked by steady and sure progress than by the meteoric brilliancy of an advancement, due to the adventitious aids of powerful and useful friends or the accidents of politics. His distinction was well won, and probably the only common it

proved was that it was not premature or undeserved—the reward of real merit and the recognition of undoubted capacity, and not the result of intrigue or accident.

James Murphy, the future Judge, was born at Kilfinane in the Co. Limerick, in the year 1826, the fourth son of Jeremiah Murphy. He was educated at Middleton, Co. Cork, at the famous school conducted there by Dr. Turpin. It is a noteworthy circumstance connected with this academy that his companions were Sir Edward Sullivan and Lord Justice Barry, and that the friendship then formed between the three remained unbroken to the end. All of them became great lawyers. Edward Sullivan was first, Master of the Rolls, and afterwards Lord Chancellor of Ireland, while Charles Barry was first, Judge, and afterwards Lord Justice of Appeal, and the two were probably the most eminent judges of their time. A former pupil in that same school was Isaac Butt—lawyer and politician of the highest rank—one who was truthfully described as “the greatest intellect ever at the Irish Bar”—a not exaggerated estimate of a man whose mind was, for its profound and varied accomplishments, a truly marvellous one. Four such men as Butt, Sullivan, Barry, and Murphy should give an immortality of fame to such a school and such a teacher. School-teacher and taught are now no more.

Leaving Turpin's School, James Murphy entered Trinity College, Dublin, in 1845, and obtained a classical scholarship there, while in 1847 he got First gold medal in Logic and Ethics, and in 1849 his degree of Master of Arts. Two of his College companions and afterwards life-long friends were Michael Morris (afterwards Lord Morris) and Michael Harrison (afterwards Mr. Justice Harrison). They entered College together, were called to the Bar in the same year, and while Mr. Justice

Harrison predeceased the other two by a few years, but three days elapsed between the deaths of Mr. Justice Murphy and Lord Morris.

Mr. Justice Murphy's two brothers, Patrick and Jeremiah, were also educated at Trinity and won high distinction there, as did later on his four sons, so that the family are associated with, and identified in that great institution of learning, with hereditary brilliant academic distinction. When James Murphy attained the age of 23, he was called to the Irish Bar, in the Trinity term of 1846. He did not, however, really set about the practice of his profession until 1851. Being a Southerner he then joined the Munster Bar, always noted for the ability and eloquence of its members. He went Sessions in Limerick city and county. Early in those years he was one day in Court after having skilfully conducted a case, when an incident he often afterwards loved to narrate occurred. He had just sat down with all his blushing honours thick upon him, when there pushed past him a big burly Limerick farmer whose case was soon to be called. Addressing his solicitor, the excited agriculturist bluntly informed him that he "wanted a Counsellor in his case." Asked whom he should have, he said, "employ that yellow-skinned little devil who has just sat down." He did not even know James Murphy's name, but he had just seen enough of him to be satisfied with his choice, and he was not disappointed in the result. Although still a stuff gownsman, James Murphy was appointed in 1867 by James Anthony Lawson, then Liberal Attorney-General, Senior Crown Prosecutor for Green Street—a position regarded in the prosecutor-ship line as the blue ribbon of the profession, and until then never given to any but a Queen's Counsel. Green Street, in Dublin, is the analogue of the Old Bailey in London. In that capacity which he held until 1883, James Murphy was engaged in the conduct of many famous trials,

the most historically interesting and important being the Fenian Trials in 1867 and the Phoenix Park murder in 1883. His conduct of the latter prosecution—one of the most sensational in the records of crime—was characterised by such remarkable skill, ability, and judgments that his elevation soon after to the Bench largely marked the Government's opinion of his services on that occasion. While at the Bar, James Murphy was engaged in many famous cases—indeed, for the last twenty years of his career he appeared in nearly every great *Nisi Prius* case heard in the Dublin Courts, for his powers as a skilful cross-examiner were highly appreciated. He acted as counsel for the petitioner in the Galway election case of 1872, when the inquiry lasted for 50 days in Galway, and was taken up in the examination of countless witnesses. The ultimate result was that the sitting member was declared by the Queen's Bench, on a case stated by Mr. Justice Keogh, to be unseated, and Major Trench, who polled only a fourth of the electorate, was held to be entitled to the seat, as he had previously to the polling given notice to the electors of the previous disqualification of the other candidate (Captain Nolan), by reason of the illegal acts of his agents. James Murphy also had a brief in the Baggott will case—a socially celebrated case. He was also, with the great Whiteside, counsel for the defence in the O'Grady Delmage case—a prosecution arising out of election riots, and wherein the Grand Jury threw out the Bill.

* Appointed Judge in 1883, he presided as such over some celebrated trials such as the Cross case, in which a medical gentleman of high social position in Cork was found guilty and sentenced to death for poisoning his wife; the Montagu case, in which a lady of good family in the North of Ireland got twelve months for cruelty to her child; and the Cotton case, in which a Protestant clergyman was charged with

shameful neglect of some children committed to his charge. In a famous crim. con. case from the Co. Clare it is recorded that the jury had actually declared their intention of coming to a certain verdict before the conclusion of the case on both sides and the Judge's summing up. Taking this palpable failure of justice in hand Mr. Justice Murphy so ably represented the issues that at the conclusion of his charge a different verdict was given. This was a remarkable instance of the success of a judicial charge in completely changing the declared minds of a jury and was a triumph of the Judge's skill.

All through his long and active life, despite the absorbing demands of his profession, Mr. Justice Murphy never abandoned his old tastes for literature, and to the last indulged in his well-known classical tastes and pursuits. Shakespeare he knew by heart, and could recite long passages from his immortal plays. Horace and Virgil were equally familiar to him. He loved rural life, and took a great interest in agriculture and its pursuits. He went largely in for the breeding of prize cattle, and his short-horns won many prizes. He dearly loved the green fields, and resided in his later years away as far as possible from the streets and dirt and din of city life in a beautifully situated hundred acres holding near Dublin, which he himself farmed.

In 1864 Mr. Justice Murphy married Mary, eldest daughter of the late Mr. Justice Keogh, who survives him. His eldest son is a doctor in London, his second, William, a member of the Irish bar, and another son is a distinguished scholar of Trinity College. Mr. Justice Murphy was appointed a Bencher of the King's Inns in 1871, and an Irish Privy Councillor in 1890. In the 75th year of a life full of work and honour, he passed away to the sorrow—sincere and deserved of all who knew him. At the opening of term, the Lord Chief Justice of Ireland—as did

Chief Baron Palles at the opening of the Commission, at Green Street some weeks before—paid an eloquent and touching tribute to the memories of Lord Morris and Mr. Justice Murphy. Referring to the latter Lord O'Brien said :—

* “Our brother Murphy will no longer be with us. In his death we have, indeed, sustained a great loss. He was beloved and respected by the members of the Bench and the Bar. A scholar and moderator in the University of Dublin, no more cultured gentleman, no more accomplished classical scholar ever sat on this Bench. His intimate knowledge of the ancient classical authors was unsurpassed, and though, perhaps, the developments of modern literature had little charm for him, yet few were better acquainted with the earlier English classics. His career at the Bar was, indeed, distinguished. I may truly say he was a great advocate. His earlier triumphs were achieved on that southern circuit which gave to fame O'Connell, Jonathan Henn, Isaac Butt and Sir Edward Sullivan. He undoubtedly was a most successful judge. He was eighteen years on the Bench, and yet no verdict obtained before him was ever set aside. The source of his success, both as an advocate and a judge, was to be found in his unfaltering love, his enthusiasm, for justice. All those who were associated with him at the Bar or on the Bench will ever retain a vivid recollection of his lovable personality. He was at once the gentlest and the bravest of men. His courage, as I have good reason to know, even under the most perilous conditions, could suffer no diminution. His fidelity to friendship, consistent to the end, knew no abatement. His character was essentially sincere. His mode of life was essentially simple. When he escaped from the fierce light that beats upon those great historical trials, with which his brilliant advocacy

will ever be identified, he sought and loved the shade. He lived his simple unostentatious life in an atmosphere made holy by the sacred influences of home."

RICHARD J. KELLY.

VI.—THE INFLUENCE OF LORD STOWELL ON THE MARITIME LAW OF ENGLAND.

IT is a truism of legal criticism that a great part of English law has been built up from judicial decisions. But since it has been so created, anyone who desires to understand its history will not be satisfied with the simple acceptance of the fact, but will endeavour to become acquainted with the progress of this creation and with the decisions of individual judges. A great deal, however, of the growth of judge-made law is hardly perceptible, many of the points are very small, many of the rules are deductions from decisions, which are accepted by lawyers as being logical results of the previous judgments, and so, though in reality created by judges, it is difficult to lay a finger upon the decision by which they have been formulated. Again, too, it is by no means easy to apportion the particular influence of individual judges, especially in later years. . When a court consists of more than one judge, it may be easy for an onlooker to regard a single member of the tribunal as the one by whom to some extent the other members are led. But when the several judgments come hereafter to be considered, it is often impossible as a matter of legal history to give one individual judgment a preponderance over another. Moreover, when the actual body of the law, whether it has been created by statutes or by judicial decisions, has grown larger, and facts have become more complicated, the influence of individual judges becomes much less. For not only are decisions *prima impressionis* much rarer, but they are also enunciated by an increased number of judges, so that the influence of the bench

becomes comparatively slight. It is not surprising that if we wish to estimate particular judicial influence which is clearly apparent we must generally go back a good many years. This personal authority was very marked at the beginning of the present century, and especially in its effect on Maritime and Mercantile law. The influence of Lord Mansfield as a creator of English Mercantile law has often been pointed out. In the kindred subject of Maritime law the influence of Lord Stowell was equally great, if indeed it was not greater, and it is of so permanent a character that some consideration of this portion of the growth of English law may be commended not only to the historical student, but to anyone who desires to become acquainted with the basis of much of our Maritime law.

Many circumstances combined to enable Lord Stowell to leave a deep and lasting mark on the jurisprudence of this country. He was the master of his judgment seat; he had no colleagues to defer to; for the long period of thirty years (1798-1828) he was judge of the Court of Admiralty; before his time no regular reports of the decisions of that tribunal had been collected, and business flowed into it in an amount unknown to his predecessors. All these circumstances combined to make this particular time one singularly favourable for the impression of a judicial influence on the comparatively meagre body of English Maritime law. There was the hour and there was also the man. Without a judge of unusual capacity, especially of remarkable powers of legal exposition, this period of thirty years would not have been so fruitful in the growth of one branch of our law. But Lord Stowell's capacity of clear expression, his mastery of legal principles, his attention to their formulation, as well as his great practical sagacity, made his judgments not only the basis of much of modern English Maritime

law, but also the clearest and most agreeable exposition of it which to this hour is to be found. It is one thing to decide a particular point, it is another to explain the principles on which the decision rests, and to apply them to the facts of the case under discussion, so that the latter may serve as an illustration of an abstract legal proposition. The proof of Lord Stowell's influence is not difficult to discover when some of his most remarkable judgments are examined; it would not be easy to find one which better serves as an example than the decision in 1801, in the case of *The Gratitude*. The result of that judgment was the creation of the rule of law that the master of a vessel has power to bind the cargo on board by a respondentia bond in order to obtain money to enable the vessel to prosecute her voyage. That rule has never since been questioned, and until steam, the telegraph, and improved postal communication lessened in recent years the necessity for obtaining money on bottomry bonds, it was one of immense commercial importance. The legal power of the master to enter into such a bond depended on his relationship to the owners of the cargo, and, therefore, Lord Stowell had, in order to establish a rule upon the point, to consider when, and under what circumstances the master of a vessel became by virtue of necessity the agent for the owners of the cargo. Having established as a legal proposition that in cases "of instant, and unforeseen, and unprovided necessity, the character of agent is forced upon him, not by the immediate act and appointment of the owner, but of the general policy of the law," and having illustrated the rule by examples, Lord Stowell then applied it to the circumstances under which it may be necessary to borrow money, not only on the security of ship and freight, but also on that of the cargo. Satisfied as to principle, the judge then examined the authorities to see what light might be thrown by them on the subject. These

authorities were not only the dicta to be found in English law, but the mediæval codes, which have been preserved. The examination completed, Lord Stowell then proceeded to consider whether the situation of the master was such in the particular case before him as to authorise the exercise of this power. We have spoken of this judgment solely in regard to the fact that it establishes a proposition of Maritime law; considering the principle on which that rule is based it scarcely needs pointing out that the judgment may be, and always has been regarded, as an admirable and conclusive exposition of the duty of a ship-master in relation to the interests of the owners of cargo under extraordinary circumstances. As such its direct and indirect influence on the whole body of English Maritime law has been marked and important.

There is now no branch of law of which the basis is more thoroughly fixed than that of Salvage. For the earliest and clearest enunciation of many of its principles the judgments of Lord Stowell must still be studied, containing as they do the principles which have guided his successors and have established the law. For example—from time to time seamen fall in with derelict vessels; when they bring such ships into a place of safety, saving them from certain loss, they are clearly entitled to a very considerable reward, to the value indeed of a large proportion of the property saved, though not necessarily to a half of this value. Such was Lord Stowell's decision in *The Aquila* so long ago as 1798, a decision which became the leading authority on this particular point from that time forth. Sixty-eight years afterwards, in *The True Blue*, the same point was pressed on the attention of the Privy Council. But it was sufficient for them to refer to Lord Stowell's early decision, to take note of his research into the older authorities, and to state his conclusion that the proper mode of deciding the question of the amount of

reward to be given to salvors of a derelict vessel was "to consider all the circumstances including the value of the property salvaged and the risk to the property of the salvors."

Nor would it be easy to find a principle of salvage law more necessary for the interests of shipowners, and of those honestly desirous of rendering assistance to vessels in distress on reasonable terms, than that those who have taken possession of a ship as salvors have a legal interest in her which cannot be divested before an adjudication takes place in a court possessed of competent authority. Therefore a second band of salvors has no right to take away from men who are doing their best to save life and property the opportunity of earning a reward, unless it be apparent that their efforts are altogether powerless to effect their object. Twice Lord Stowell laid down these rules with emphasis and clearness; so that from the date of the two decisions—the one in 1809, *The Maria*, and the other in 1814, *The Blenden Hall*, this proposition has been a clear rule of maritime conduct. It is not unworthy of note, as showing the character of naval life at the time of these cases, that in both instances, those whom we may call the piratical salvors, the second band who tried to dispossess those who had first tendered their services, were officers and men of the Royal Navy. Perhaps, at the beginning of the century, the wilder daring of the Elizabethan seamen was emulated by their modern successors.

Leaving the subject of salvage, though we have by no means exhausted the various decisions in which Lord Stowell built up the modern English law of salvage, we pass on to his judgment on the question of the sailor's lien for his wages on the ship. That judgment delivered in *The Neptune* in 1824, stands out just as remarkably as that in *The Gratitude*, expounding and laying down as it does a principle of Maritime law of the most vital importance.

In the first place, it diminished largely the effect of the old maritime rule of English law that freight is the mother of wages, confining that maxim to cases where a vessel has wholly perished. It also, while laying down the principle that a seaman has a lien on the ship on which he has served to the last plank, expanded it so that while it gave him this privilege it thereby prevented him from becoming entitled to any extra reward as a salvor. Lord Stowell viewed the matter from no narrow standpoint, and he decided as he did because "private justice and public utility range themselves decidedly on that side of the question which sustains the claim of the mariner." To have held that a crew bound to do their utmost in the service of the owner, if the ship is in peril should be able to assume the character of salvors, so that in time of danger they should be seeking for extra remuneration, would obviously have been dealing a blow to the sense of duty by which seamen have to be bound, and would have with equal certainty given opportunities for the grossest frauds to be practised on owners of vessels by unscrupulous officers and crews.

This article is not a criticism of Lord Stowell as a judge, but an attempt to show what his influence was on the body of English law. His own words in the conclusion of his judgment in *The Neptune* (1824) show so clearly the various features of his judgments which have enabled them to influence English law so greatly that it is pertinent to transcribe them here. "Upon all these grounds," he says, "of the general practice of Maritime States, upon the just policy of the rule, its simplicity and convenience upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case, not

exactly upon this question—that the seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them. Be it remembered that by the general and just policy of all Maritime States, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavour to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, it is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved so far as they will go in satisfaction of his wages already earned by past services and perils.” There are some judges who, though they have been eminent for their knowledge of legal principles and legal decisions, have wanted that practical sagacity which enables them to see the bearing on affairs of legal rules. A judge of this character, placed in Lord Stowell’s position, would have failed to rival his influence, because his judgments would have been wanting in practical point, and would have been too overweighted with legal learning. There have been other judges distinguished for mental clear sight, for appreciation of practical difficulties, but whose grasp of legal principles from various causes, has not been equal to their common sense. Such a judge as this would not have had that sound basis of legal knowledge which would have enabled his judgments to be received in after years with absolute confidence. There have been judges too—most careful in the precise and accurate exposition of their opinions, yet wanting in breadth of view, and there have been judges who have been gifted with a power of forcible or pleasing expression yet who have not been great lawyers. Thus it

is clear that the moulding of English Maritime law at the beginning of this century, was to some extent, largely affected by the circumstances that in the Admiralty Court, Lord Stowell, and in the Court of Queen's Bench, Lord Mansfield, were the presiding judges.

Great painters have often left behind them pupils who have passed on their style and influence. If it is allowable to call one judge the pupil of another, it may be said that Lord Stowell's successor, Sir Christopher Robinson, was in some senses his pupil. The direct and indirect influence of Lord Stowell is constantly seen in the judgments of Sir Christopher Robinson. Nor is this to be wondered at, because he was the first to report the judgments delivered in the Court of Admiralty, and he had for years sat at the feet of a great master of law. He, therefore, had a natural reverence for the decisions of Lord Stowell. He directly acted on these when he was able to do so, and to some extent he caught Lord Stowell's broad and clear manner of reasoning and of expression. The principles of Admiralty law are now among the best defined, and the most certain of any part of English jurisprudence. This, no doubt, arises to some extent from the fact that it is not a subject in itself of intricacy. The right to salvage, to wages, the responsibility for collisions at sea, when elementary principles have been laid down, depend largely on questions of fact. But that these principles have been established in a broad, a clear and a satisfactory manner, is very largely owing to the judicial influence of Lord Stowell at the beginning of this century.

The circumstances under which he delivered his judgments, which have been already pointed out, make it easier to observe his influence, than it is to note that of other judges, and a consideration of his most remarkable decisions enables us to estimate his judicial authority, to take him as a leading example of the way in which English

law has been formulated by the Bench, and also to regard these decisions as legal landmarks. It must not be supposed that an undue importance is to be attached to them over that of other and later judges in the other Courts of the country. Such judges as Sir George Jessell, Mr. Justice Wills, Sir Creswell Cresswell, and others, have each and all left their mark on the history of English law. But none of them was so favourably placed as Lord Stowell for the purpose of leaving behind a clearly defined influence.

Nothing has in this paper been said as to Lord Stowell's influence on the law of Prize, a subject which in consequence of the Napoleonic wars was constantly before him. The law of Prize is rather a branch of International than of Municipal law, and so is outside the range of these remarks, which have been confined to indicating, in some degree, the influence of Lord Stowell on the growth of English Maritime law.

E. S. ROSCOE.

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

The New Isthmian Canal Treaty.

THE ratification of the new Hay-Pauncefote treaty by the Senate of the United States, adopted as it has been with a celerity and unanimity hardly to be hoped for, disposes most satisfactorily to both parties of one of the outstanding questions between Great Britain and the United States. President Roosevelt in his Message to Congress described the treaty submitted to the Senate as one which guaranteed his country every right it had asked for in connection with the Isthmian Canal; and our own Foreign Office may equally be congratulated on having

carried the points on which it laid stress in the negotiations in connection with the former treaty. The practical result may be described to be the adoption of the former treaty with the addition of the amendment proposed by the Senate expressly abrogating the Clayton-Bulwer treaty and with the omission of the other amendments (which proved fatal to that treaty) empowering the United States to fortify the Canal and declaring the restrictions of that Convention inapplicable to any action which the United States might be required to make for its own defence and the maintenance of public order. It will be generally admitted that the omission is well advised, experience shewing that minuteness of detail is as likely to defeat its objects in international treaties as it has proved in the case of our recent municipal legislation, and that the application of an international agreement to the particular cases which arise under it is better determined by following the general spirit of the whole text than by trusting to special provisions to embrace all the particular cases brought up in practice. The express abrogation of the Clayton-Bulwer treaty does not, it is safe to assume, qualify or nullify the self-denying ordinance with regard to the political relations of the two Powers towards Central America embodied in that treaty, as a permanent principle of their foreign policy *inter se*, which has been lately reaffirmed for the United States by its President in his explanation of the Monroe doctrine and has been irrevocably established for ourselves by the political tradition effected by the fifty years' continuance of that treaty. The record of the political relations of the two countries in this particular connection, sketched in these notes previously (Vol. xxvi. pp. 231 and 339) makes it an entirely reasonable arrangement that the party which undertakes the burden of the work should alone control and manage it and be responsible for its use by all

On equal terms; and foreign nations generally should be well satisfied to secure this benefit gratuitously. Signs that the work may soon be undertaken are to be found in the lease by the United States of a strip of territory across the Isthmus fringing the line of that route; and in the report of the Commission to the President on the merits of the respective routes. That report shows clearly that the Panama route *ceteris paribus* is preferable, if terms can be arranged with the Company which now holds the concession granted to M. de Lesseps and his Company by Columbia.

South Africa Deportation Claims

It is equally satisfactory to notice the close of the inquiry into the amount of compensation agreed to be paid by the British Government to neutrals deported from South Africa, which promised to have a very protracted course, owing to the anomaly (in International law) of one government litigating with individual foreign subjects instead of with their governments, although each government represented the claims of its own subject before the tribunal of inquiry, and owing to the fact that the condition—a perfectly proper and necessary one in such an anomalous inquiry—required by the Commissioners that each claimant must appear in person to prove his claim was one which it was impossible for the majority of claimants to comply with in the absence of pecuniary help from their governments. The remedy was found in the adoption of the more correct and business-like course of the offer to and acceptance of a lump sum by each foreign government in full discharge of the claims of their respective subjects; and this resulted in the satisfaction (admittedly a liberal one) of an aggregate of claims amounting to more than a million pounds by the payment of an amount less than one-tenth of that sum. This solution may well furnish a precedent

for future cases of a similar kind. Another inquiry is pending at Pretoria into the amount of compensation to be paid by the British Government to neutral inhabitants of the area affected by the war for requisitions, damages to property and the like, incurred in the course of the operations. This "act of grace" is now by practice generally recognised as an obligation, *e.g.*, Chili paid compensation to various European States for losses incurred by their subjects in her war against Peru and Bolivia in 1880, and her civil war of 1891.

The Foreign Policy of the United States.

The first message sent to Congress by President Roosevelt, noteworthy in other respects in International law for its striking definition of the attitude which his country feels itself called upon to take in general international politics, is peculiarly so in its being the first official suggestion of providing by international agreement against the danger of Anarchism. The President declares it as his opinion that Anarchists or persons professing principles hostile to all state government and justifying the murder of those placed in authority should be excluded from the United States, or if in the United States should be deported to the country whence they came: that the Federal Courts should be given jurisdiction over any one who attempts to kill the President or a person in the line of succession to the Presidency: and that the punishment for unsuccessful attempts should be proportioned to the enormity of the offence against American institutions; and he ends by recommending that "all civilized Powers by treaties should declare the crimes of Anarchists to be offences against the Law of Nations like piracy and the slave trade." Attention was called to this analogy in the last number of this Magazine (p. 82); and the present proposal indicates the lines on which it should be

quite practicable by general international agreement to provide for the uniform punishment and repression of such crimes by the municipal criminal law of all States.

Perhaps the most interesting part of the message is its exposition of the Monroe doctrine, which seems likely to be tested by developments pending between Germany and Venezuela, owing to the failure of the latter Government to pay interest on loans made to it by German subjects. The doctrine is declared to be in keeping with the purposes of the Hague Peace Convention, being a step towards securing universal peace by securing the possibility of permanent peace in the Western hemisphere, in no way intended to be hostile to any nation of the Old World, and still less as a cover for any aggression by one New World Power at the expense of another, but as a safeguard for a permanence of independence for the lesser States among the New World nations similar to that which prevails in Europe. The policy of the United States on this principle is declared negatively by disclaiming any wish to have exclusive commercial dealings with any other American State, or to guarantee any State against punishment for misconduct provided the punishment does not take the form of acquiring territory by any non-American power, or to secure any territory for itself from its neighbours. The statement, taken as a whole, seems to mean that the doctrine is equivalent only to the maintenance of the *status quo* in the Americas, and has its counterpart in Europe in the principle of the balance of power. Accordingly all aggression in the Americas by one State, whether American or not, against another is prohibited; but in case of misconduct (i.e., war), one American power can deprive another of territory, which a non-American power cannot do to an American State. The statement does not say how the Monroe doctrine would be affected

by the acquisition, peaceful or warlike, of the American possessions of one non-American power by another, *e.g.*, a French West Indian island sold to Russia, or Dutch Guiana to Germany. At first sight this should stand on the same footing as a cession by a non-American power to an American one, *e.g.*, the sale of a Danish West-Indian island to the United States. But the validity of such a transfer of sovereignty would probably be treated by the United States (and with reason) as depending on whether its result brought about a change in the present balance of power, on the analogy of the European principle.

Rights of Aliens and Municipal Law.

The internationally important question whether aliens are entitled to avail themselves of rights granted in general terms by our Municipal law has been lately brought up for the decision of our Courts in claims by the representatives of foreigners to recover damages for their deaths on board foreign ships on the high seas in collisions caused by the negligence of British ships; and a Court of two judges over-ruling the decision of a single judge (*Adam v. British and Foreign S.S. Co.* [1898], 2 Q.B., 430) has allowed the validity of the claim under Lord Campbell's Act. (*Davidson v. Hill*, 17 T. L. R. 614). This is in keeping with former decisions of the Court of Admiralty (*The Guldaxe*; *The Explorer*) which have been considered of uncertain value in that they decided that the remedy given by this Act was available by the Admiralty process *in rem*, and this view was subsequently negatived by the House of Lords in the *Vera Cruz* case. The same question was formerly raised in connection with the right given to "shipowners" generally to limit their liability for loss caused by collisions under the Merchant Shipping Act, 1854; it was held that this privilege was not available to foreigners: and subsequent express legislation (1862) was required to make it so

The same general question underwent exhaustive discussion in cases on our law of copyright. In *Jefferys v. Boosey* the House of Lords decided that an alien author resident abroad could not take advantage of the general terms giving authors copyright on publication in England; while in *Routledge v. Low* the same Court held under a later Act that an alien resident in a British colony was entitled to benefit by similarly general words. In the former case the rule of construction of general words in a statute was stated to be that "*prima facie* a British statute is intended to legislate for British subjects (by birth or residence) only, and not for aliens resident abroad unless there are express words (or) special grounds for inferring that it was meant to have a wider operation;" but in the latter case this rule was adversely criticised and an inclination was shown to favour another definition suggested in the former case that "where personal rights are conferred on persons filling any character of which foreigners are capable are mentioned they would be comprehended unless the context shows that they are to be excluded." The fact that aliens equally with subjects have the right to sue in our Courts for non-fatal accidents is a strong argument for inferring that they were meant to share in the new right given in cases of fatal accidents.

As further instances of the territorial application of statutes it should be remembered that it has been decided (1803) that an alien friend within the jurisdiction can take the benefit of the poor laws; and that under the bastardy statutes it has been held that "children" does not include children born abroad and specially of foreign mothers.

It is of interest to notice that a French Court in a case of similar circumstances to these now under consideration, has declared that the decision in *Adam's* case, even if it

represented the correct view of English law, could not be recognized in France (as the law of the flag would be usually in such cases) on the ground of its flagrant opposition to the most primary and established rights of French public law (Clunet, *Journal du Droit International Privé*, 1901, p. 102). The French law, however, seems to have parallel deficiencies in the decisions set out in the same volume on the French Workmen's Compensation Act of 1898 (one chief object of which law is to compensate the representatives of workmen whose death is caused in the course of their employment) which shew that if these representatives are not resident in France at the time of the injury they can recover nothing, and the foreign workman who is thus injured, if he ceases to live in France or is resident abroad (e.g., across the border in Belgium) at the time of the injury, can only recover compensation on a lower scale.

Chili and the Argentine Republic.

The announcement that our Foreign Office is about to send out a member of the arbitral tribunal appointed to decide the Chilian-Argentine boundary at Ultima Speranza (near the Straits of Magellan), in order to investigate the nature of the territory in dispute, although the respective cases on both sides are not yet submitted, does not come too soon, after the difficulties which have been raised by the occupation of that territory by one of the parties. It will be remembered that these difficulties now date back some time. In 1878 the two States agreed to refer to arbitration the delimitation of their boundary near the Straits of Magellan and elsewhere as they had already agreed by treaty in 1856; and the representatives of the United States accredited to those States respectively to whom the question was referred made an award in 1881 settling the boundaries, and declaring the Straits of Magellan perpetually neutral and open to all nations and

not to be fortified. Difficulties, however, arose as to the interpretation of the treaty embodying this award ; and in 1896 it was agreed to refer the question to the arbitration of Queen Victoria, which was done in 1898. Another dispute between the same countries which arose with regard to the delimitation of the northern boundary was settled similarly by the arbitration of a delegate of each country and the United States Minister in Argentina in 1899. Although the South American Republics are not parties to the Hague Convention, they have mostly shewn themselves ready to resort to arbitration as a means of settling their differences ; *e.g.*, Argentina and Paraguay as to boundaries in 1878, and Argentina and Brazil in 1886 and 1889 ; and both these States, especially Argentina, have taken part in some of the general international agreements and conferences of the world. In view of the present position it is worth recalling that in 1864 Great Britain and Argentina submitted to the arbitration of the President of Chili the question of making good the losses caused to British subjects by a decree of the Argentine government prohibiting vessels from Monte Video from entering Argentine ports, which was decided in favour of Argentina.

G. G. PHILLIMORE.

VIII.—NOTES ON RECENT CASES (ENGLISH).

TWO decisions recently reported are interesting, chiefly as showing the unsatisfactory state of the law as to gifts by will to illegitimate children. The first is *In re Du Bochet, Mansell v. Allen* (L.R. [1901], 2 Ch. 441). Here the facts were as follows: Richard Du Bochet was living with a woman who was reputed to be, but who, in fact, was not, his wife. His aunt, who believed he was married to the lady, gave a share in her residuary estate to "the children (being daughters of my nephew, Richard Du Bochet." At the date of the will Richard Du Bochet had two daughters by his reputed wife. Subsequently, but before the death of the testatrix, another daughter was born to him. The testatrix knew of the birth of this child, and it was not questioned that all three daughters were believed by her to be included in the gift. The question before the Court was whether any of them were. The Court (Joyce, J.), held reluctantly that the two born before the date of the will were included, but the one born afterwards was not.

This result seems to follow from the decision of the Court of Appeal in *In re Bolton* 31 Ch. D. 542. That decision is, however, scarcely consistent with the earlier case of *Occleston v. Fullalove* L.R. 9 Ch. 147, as interpreted by Jessel, M.R., in *In re Goodwin's Trust* (L.R. 17 Eq. 345), nor with some of the dicta, at any rate, in *Hill v. Crook* (L.R. 6 H.L. 265). It is true that in *Occleston v. Fullalove* (*supra*) the bequest was to the children the testator had by a certain woman, and any others he might have, or be reputed to have, by her. But when the word "children" in a will is not to be read as "legitimate children," must it not be read as "reputed children"? And if it is to be read "reputed children" were the judges in *In re Bolton* (*supra*) not confusing the fact of parentity with the reputation of parentity when they enlarged on the difference between parentity

described by reference to the mother and parentity described by reference to the father? If the reputation is all that is required, why should any enquiry in the case of description by paternity be necessary into the actual fact as they suggest?

The other case is *In re Wood, Wood v. Wood* (L.R. [1901], 2 Ch. 578), where there was a gift by will on the death of an illegitimate daughter without issue over to her next-of-kin in the shares they would take under the Statutes of Distribution. On the death of the daughter without issue, Kekewich, J., felt bound by the decision of *In re Standley's Estate* (L.R. 5 Eq. 303), to hold that the persons who would have been her next-of-kin according to the statutes, if she had been legitimate, could not take. No doubt *In re Standley's Estate* (*supra*) is precisely in point here, and it has never been expressly overruled. But it has often been questioned (see *per* Stirling, J., *In re Diakin*, 1894, 3 Ch. 565), and it seems impossible to reconcile it with *Hill v. Crook* (*supra*). There Lord Cairns lays down the principle on which the Courts should proceed thus:—"If you find that that is the nomenclature used by the testator, taking the will as the dictionary from which you are to find the meaning of the term he has used, that is all which the law, as I understand the cases, requires." And this is the rule followed, or professed to be followed, by the Courts, ever since this judgment—the Court is to read the words used by the testator in the sense in which the will shows he meant to use them. But the basis of the decision in *In re Standley's Estate* (*supra*) seems quite different. Thus Wood, V.-C., says in the judgment:—"What the testator has attempted to do is this, to declare that his children, though illegitimate, shall be regarded as if they were legitimate; and then to say that under the description 'next-of-kin' shall be let in all the persons who would have been their next-of-kin had they been legitimate. I apprehend

that is an attempt which the law will not permit to succeed." If this does not amount to a declaration that the Court will not read the words of the testator in the sense in which the will shows he meant to use them, it is hard to guess what the Vice-Chancellor intended to express.

It is very desirable that both these cases should go to the House of Lords. Indeed, in one of them, the learned Judge invited the parties to take it there. Of late the decisions as to gifts to illegitimate children have not proceeded on any very clear principle, and it is time we should have a broad decision of the highest authority like that of *Hill v. Crook* (*supra*), which formerly did so much to settle the law on the point. Of course, no decision will prevent cases of hardship in the future. These arise more often from the ignorance of the testator of the illegitimacy of the objects of his gift, or from the desire to conceal it, than from any defect in the law. But all the same, a broad principle would do something to prevent them, and besides it would enable counsel to advise in such cases with more assurance than is possible now.

Burrows v. Lang [L.R. [1901], 2 Ch 502], is an interesting decision. There the defendant was the owner of some land on which an artificial water-course, for the purpose of working a mill, also on the defendant's property, had existed for over a century. No evidence was forthcoming as to the construction of the water-course, but from 1831 to 1886 both the defendant's and the plaintiff's land (which was a cattle farm and abutted for a short distance on the water-course) belonged to the same owners, and then the cattle on land now belonging to the plaintiff watered at the water-course. In 1886 the owners conveyed the cattle farm to the plaintiff, and in 1893 they conveyed the mill property to the defendant. The plaintiff continued to water his cattle at the water-course from 1886 till recently when the defendant cut off the intake of water and fenced off

the water-course. On these facts the Court held that the plaintiff had acquired no rights either by implied grant or under s. 6 of the Conveyancing Act, 1881, to have the water-course continued for his benefit, nor was he entitled to water his cattle whenever water was in fact in the water-course.

Many points were considered and decided in the judgment, but perhaps the three most interesting were: Firstly, that a precarious easement—i.e., one, the enjoyment of which the servient owner can legally put a stop to—is a right unknown to English law; secondly, that s. 6 of the Conveyancing Act, 1881, was never intended to create or protect rights other than those known to English law at the time the Act passed; and thirdly, that a water-course constructed for the purpose of working a mill, though it had existed for over a century, was constructed for a temporary purpose within the principle of *Arkwright v. Gell* (5 M. & W.), 203.

It may be doubted whether "temporary purpose" is a happy description of the ground on which the third point, or the point in *Arkwright v. Gell* (*supra*) was decided. No doubt construction for a temporary purpose is a good ground to prevent the acquisition of an easement for any work; but it seems peculiar to apply such a description to a purpose which existed in connection with a permanent structure and which had continued for over a hundred years. As the reasons given in *Burrows v. Lang* shew the real ground of the decision was that if the Court had held that the easement contended for was good, the effect would have been to impose active duties on the servient owner. Now, an easement never can impose active duties; all it can impose is a duty of forbearance. In *Arkwright v. Gell* (*supra*) the artificial waterway was caused by the defendant pumping the water out of his mine. It would be monstrous to contend that he was to be compelled to go on pumping to all eternity in order that the plaintiff might use the water. If he had

drained his mines by natural gravitation, or if in *Burrows v. Lang*, the water had been taken in over a weir and not by sluices which needed constant regulation, the question would have been very different.

Brewers of late have been far from fortunate in litigation between them and the tenants of tied houses. In *Lacon v. Laceby* (1897, W.N. 46) it was held that a covenant by such a tenant not to carry on any other business than that of a retailer of tobacco, wine, and beer to be consumed off the premises, with a proviso for re-entry in case the tenant ceased to carry on such business, gave rise to no implied obligation on his part not to surrender the licence. In *Laceby v. Lacon* (1899 A.C. 222) it was held that an undertaking by such a tenant to surrender the off-licence of the "tied" house on condition that another off-licence which he held for part of a "free" house was extended or renewed, so as to apply to the whole of the free house, was not a transfer of the licence of the tied house to the free house, and so the justices could grant the licence to the free house, and accept the surrender of the licence for the tied house without any notice of the transaction being given to the landlords of the latter. And now in *Noakes and Co. v. Rice* (112 L.T.J., p. 196) the House of Lords, affirming the decisions of the Courts below, have held a covenant in a mortgage of a leasehold public-house to a firm of brewers prohibiting the mortgagor from selling on the licensed premises malt liquors, not purchased from the mortgagees, although valid during the continuance of the security, cannot be maintained after the mortgage debt has been paid off, as being a clog on the equity of redemption. As some slight compensation for these disasters in *Manchester Brewery Company v. Coombs* (L.R. [1901], 2 Ch. 698), it has been held that where a tenant has obtained possession of a house under an agreement for a lease containing a

covenant by the tenant that he would buy his beer from the lessors "and their successors in business" such covenant was binding on him after the lessors had transferred their business to another brewery company, although the agreement was never in fact executed by the lessors and although the word "assigns" was not used in the covenant. It is useful in this connection to remember *Friary Holroyd and Healey's Breweries Limited v. Singleton* (L.R. [1899], 1 Ch. 86 ; 2 Ch. 261). J. A. S.

Assignment of Debt.

By slow elimination the meaning of an absolute assignment of "any debt or other legal *choses in action* under s. 25, sub-s. 6 of the Judicature Act, 1873, will no doubt be arrived at in the fulness of time. A further step in the process has been made in *Jones v. Humphreys* (L. R. [1902], 1 K.B. 10 ; 85 L.T. 488), where the Court (Lord Alverstone, C.J., Darling and Channell, JJ.) have decided that an assignment of an undefined portion of future debts will not come within the section. The facts of the case were that an assistant in a school assigned to the plaintiff, in consideration of an advance, so much of his income and salary coming from the defendant, or from any other source whatever, as would be necessary for the payment of a sum named or of any further or other sums in which he might thereafter become indebted to the plaintiff. The document which embodied this obligation was, the Lord Chief Justice pointed out, "not an absolute assignment of any definite sum, but a mere security purporting to be by way of charge." It contemplated that the sum named might be increased by further borrowing or reduced by payment, and that the borrower's salary should be applied to the plaintiff's claim, whatever it might happen to be. With regard to the operation of the section on future debts, there are, amongst others, three prominent points. An absolute

assignment of the whole of a future debt is good. The assignment of an undefined portion is bad. But the validity of the assignment of part of such a debt remains still unsettled. The Court in the present case refrained from delivering an opinion on the point. The Lord Chief Justice went so far as to say that he thought "that an absolute assignment of a definite sum out of a future debt might possibly be within the section," but Darling, J., considered that it was "extremely doubtful." This was the view also of Chitty, L.J., who in *Durham Bros. v. Robertson* (L.R. [1898] 1 Q.B., at p. 774), said, "It appears to me, as at present advised, to be questionable whether an assignment of part of an entire debt is within the enactment."

Seamen's Wages.

The unreality of consideration where the promisee undertakes to fulfil the conditions of an existing contract was long ago settled, but Lord Alverstone, C.J., and Darling and Channell, JJ., were recently called upon to re-affirm the doctrine in *Hopkins v. McBride* (46 S.J. 52). In this case seamen had engaged for specified wages to work a vessel from Hartlepool to Capetown and back. In the course of the voyage the vessel struck on a rock, and the crew demanded as the condition on which they would work the vessel home a bonus of a definite sum. This sum the captain promised, but the owners refused to ratify the promise, and the action was brought. The Court held that as the vessel was not unseaworthy, and the crew incurred no unusual risk, the contract was not binding; but that if circumstances had arisen which would have entitled the crew to detain the vessel, then the promise might have been binding. The first part of the decision that a bribe to induce a man to fulfil a duty which he has undertaken for reward is no consideration, was laid down in *Stilk v. Myrick* ([1809], 2 Campb. 317), which was also a

seamen's action, where Lord Ellenborough held that the crew "before they sailed from London, had undertaken to do all they could under all the emergencies of the voyage," and that an agreement to pay them more was void for want of consideration. The second part was laid down in *Turner v. Owen* (3 F. & F. 176), when the vessel having proved unseaworthy, a promise of extra reward to preserve the contract was held to be binding.

SCOTCH CASES.

The Workmen's Compensation Act.

Amidst the mass of litigation to which the Workmen's Compensation Act has given rise, perhaps the most extraordinary judgment is that of *Cooper and Company v. AFGovern* decided by the First Division of the Court of Session on 14th November last (39 Sc. L. Rep. 102). The court held that a railway servant in charge of a lorry making the round of Glasgow streets collecting goods for transit by his employers' railway, was, for the purposes of the Act, an employé of the firm whose goods he happened to be handling when he was killed by an ordinary street accident. The lorry on which the goods were being placed was on the other side of the street from the "factory," and 32½ feet distant from it. Neither the "factory" nor the goods had anything to do with the accident which was caused by the railway company's servant being jammed between his own lorry and another lorry standing in the somewhat narrow roadway. The Lord President's opinion was concurred in without remark by Lord Adam, but was strongly opposed by Lord M'Laren, who took the view that the liability of the "undertaker," in relation to a contractor's servants, was limited to cases "where the work done by the contractor is part of the 'employment' or organisation of labour which

is carried on in an establishment of the nature defined, *i.e.*, in the present case a 'factory.' " If this decision is to be followed, then the person in charge of the corporation dust-cart, who is injured by a passing vehicle while going his morning rounds, will now claim his damages from the owner of the nearest dust-bin, provided it happens to have issued from what is technically known as a "factory." It is much to be regretted that by a slip in the drafting of the Workmen's Compensation Act, appeals to the House of Lords from Scotland are not permitted, though fully recognised and acted upon in England. (*McKinnon v. Barclay, Curle and Co.*, 1901. H. of L. 38 Sc. L. Rep. 611.)

The "Firm" in the Scottish Law of Partnership.

A point of divergence between the law of partnership in England and Scotland was illustrated by *Brember v. Rutherford* (1901, 39, Sc. L. Rep. 38). A hotel-keeper in Strathaven named Brember lent his brother-in-law Flynn the greater part of the capital required for a chemist's business in Annan, and at the same time became tenant of the shop and allowed Flynn to carry on business under the firm name of "Brember and Co." The pursuer in this action was creditor in a business debt and directed his summons against the firm without any individual partner being enjoined as defender. He then proceeded to charge Brember as a partner, or at least as liable through having held himself out as a partner. In the case of an actual partner the law of Scotland permits diligence so founded to proceed, but in this case it was shown that Brember was not really a partner and it was held that the plea of "holding out," though it might be perfectly good in an action directed against Brember personally, did not warrant a charge upon a decree directed against the firm of which Brember was not in point of fact a member.

R. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER
LENGTH IN SUBSEQUENT ISSUES.]

Records of the Borough of Leicester. Edited by MARY BATESON.
London: C. J. Clay & Sons. 1901. Vol. II.

Many of the Corporations of our large towns are giving valuable assistance to research into our early legal and social history, and the Records of Leicester are by no means the least valuable that have been published. The present volume, which is the second that has been issued, is edited with great care and learning by Miss Bateson, and revised by Mr. W. H. Stevenson and Archdeacon Stocks. It contains extracts from the Corporation of Leicester's Archives 1327-1509, but there is a curious gap "of some 75 years which is bare of information where the earlier and the later years are full." During that period the records of borough legislation, of the proceedings of the Merchant Gild and of the chamberlain's accounts are absent. The features of the greatest interest which are pointed out in the learned introduction are the rather exceptional relations between the Borough and its Lord, the latter being sometimes also the Sovereign; the way in which the usual purchase of the *Firma Burgi* was replaced by some intermittent leases of the *bailiwick*; the gradual manner in which the Merchant Gild and the Portmanmoot coalesced and reappeared as a town-council; and the mode in which the government of the Borough became vested in a limited body with powers of co-optation. Much of the municipal legislation is full of interest, especially that connected with sanitary matters; and there is much information about the formation and objects of Gilds. The information about victuals and prices is very curious. Lampreys seem to have been more expensive than salmon; and, generally, game seems to have been either much more plentiful or much more subject to regulation than in the time covered by the first volume. A writ for a *Bulinger* would seem an unusual demand on an inland town, and we may observe that this is an earlier use of the word than any given in Dr. Murray's great Dictionary. There are several indices, but surely the end of the second volume is not a convenient place to put the Subject Index of Vol. I.

Cases on Criminal Law. By COURTNEY STANHOPE KENNY, LL.D.
Cambridge University Press, 1901.

Mr. Kenny has made this selection of Criminal Cases with the object of assisting elementary students by giving "vividness and reality to the abstract principles which he learns from his text books," and helping him to "form a clear idea of the way in which questions, whether of law or of fact, are handled in every day practice by our courts of justice." It is interesting to read the Author's denunciation of the compendious method of perusing nothing of the case beyond the head note; "as a plan of study which combines the disadvantages of reading case-law with those of reading text-books." To remedy this, he has collected these cases from a variety of sources, including the year books and American reports, and has arranged them in a logical sequence to illustrate.—I., General Principles; II., Definitions of Particular Crimes; III., Modes of Legal Proof. The second division is the longest and ranges from Suicide to Libel. Most offences of importance are at least touched on, except what may be called sexual offences. The cases selected have been as far as possible short ones, and if not so, have been judiciously abridged. In some instances the Author has added a note of explanation, or to indicate an alteration of the Law. We certainly think that the object aimed at by Mr. Kenny will be well attained; and that his work will do more for students than presenting them with "brief and vivid illustrations of the English Criminal Law."

The English Reports. Vols. IX., X., XI. Edinburgh: William Green & Sons. London: Stevens & Sons. 1901.

We are heartily glad to be able to congratulate the enterprising publishers of this great re-issue, in having successfully completed the first series of their undertaking. We must also congratulate the learned Editor on his well-earned preferment, and express our satisfaction that he should have been able to complete one stage of his work. The present volumes complete the House of Lords reports up to 1866, and the original 58 volumes of House of Lords reports have been reduced to 11 volumes. There has been no diminution in the care and accuracy shown in the editing.

Volume IX. contains Maclean & Robinson, West, and House of Lords Cases (Clark's) Vols. 1-2. Among the cases

reported are *Clyne's Trustees v. Clyne*, remarkable for an impassioned defence by Lord Brougham of the Scotch Judges appealed from, whom he says "are so foully, falsely, and most unjustifiably assailed." In another case the Plaintiff is no less a personage than the Queen of Portugal and the Algarves. *Flight v. Thomas*, is an important light and air case, and *Foley v. Hill* lays down the principles of the relation between Bankers and their Customers. There are several important marine insurance cases, such as *Benson v. Chapman*; *Stewart v. Greenock Marine Insurance Co.*; *Fleming v. Smith*; and *Irring v. Manning*. Other important cases are *Dunlop v. Higgins* (acceptance of contract by post), and *Duke of Brunswick v. King of Hanover* (status of foreign Sovereign in English Courts).

Vol. X. contains House of Lords cases (Clark's) Vols. 3-6. We notice an important petition of right case—*De Bole v. Reg.*; *Dimes v. Grand Junction Canal*, a very important case as to the interest of a Judge; also the case of *Egerton v. Brownlow*, which raised an interesting point of public policy, and raised, but did not decide, the question whether a subject can refuse a peerage. *The Eastern Railways Co. v. Hawkes* decided some important points as to the liability of a corporation for the acts of promoters. In *Carron Iron Company v. MacLaren* a number of points dealing with the power of a court in this country to restrain a party from proceeding in a foreign court were considered. *Scott v. Avery* was on the question of ousting the limits of jurisdiction by contract; and *Ridgway v. Wharton* is an important and well-known decision on the Statute of Frauds. *Shaw v. Neale* dealt with the uninteresting but practical subjects of costs, solicitors' lien, etc. *Gibson v. Small* laid down the important principle that there is no implied condition of seaworthiness in a time policy effected on a vessel then at sea.

Vol. XI. contains House of Lords cases (Clark's) Vols. 7-11. This volume contains a number of very important cases among which we may mention the well-known *Berkeley Peerage* case; *Dolphin v. Robins* (domicile and divorce jurisdiction); *Chasemore v. Richards* (right to underground water); *Wing v. Angrave* (presumption of survivorship); *Cox v. Hickman* (partnership); *Rourbotham v. Wilson* (right to support of surface); *Brook v. Brook* (marriage in prohibited degrees). There are also two other cases dealing with rights connected with navigable rivers, *Malcomson v. O'Dea*, and *Gann v. The Free Fishers of Whitstable*. The only others we have space to

mention are the railway case of *Peck v. North Staffordshire Railway Company*, and that leading series of rating cases known as the *Mersey Docks* cases. We could have wished that this series had concluded with an index volume, as the vast mass of valuable law contained therein is rather inaccessible without any handy guide to it other than the lists of names of cases in each volume, but that does not seem to be intended. It would, of course, be a work of great labour, but also of great value for ready reference.

The Income Tax Acts. By HERBERT ST. GEORGE PEACOCK assisted by ROLLO F. GRAHAM CAMPBELL. London: Sweet & Maxwell. 1901.

We have here the Income Tax Acts and Acts relating to Income Tax from 1842-1901. The Acts are given in their chronological order, and repealed sections are printed in italics. There is an excellent system of cross references, which is particularly indispensable in treating of this subject, to guide the reader through the confusion of the Acts. In the vast majority of such references Mr. Peacock has followed the praiseworthy practice of giving the page of the book as well as the reference to the Act. The notes seem very clear and good, and the only omission we have noticed is that the recent case of *Baumont v. Bowers* has not been noted up under s. 146 of the Act of 1842.

Law and Practice in relation to Companies. By WILLIAM DONALDSON RAWLINS, K.C., M.A., and MALCOLM MARTIN MACNAGHTON, M.A. London: Butterworth & Co. 1901.

There is no lack of books on Company law, yet there is always room for one more good one, and that we have here. It is not the offspring of the new Act, but was planned and begun nearly two years before its appearance. It is in one volume which is a great convenience when, as in this case, the result is not the production of too big a book. The print and paper are all that can be desired, and it is remarkably free from typographical errors. In fact, we have not come across any at all, for which feature the authors are no doubt indebted to Mr. Heckscher, whose "lynx-eyed vigilance" they so gracefully acknowledge in their preface. The main portion of this work is divided into two parts, the first deals with the Companies Clauses Acts, and the second with the Companies Acts. Their provisions are compared by a thorough

and complete system of cross-references. Great care and labour must have been expended on the notes which are remarkably concise though clear, and it is by this conciseness together with the precautions taken against overloading the pages with authorities, that the Authors have been able to produce a book of such reasonable bulk. In each part the book "essays to consolidate each of the above series of Acts." The bold attempt at what the Legislature has feared to do supplies a great practical convenience; and the plain text of the Acts is set out in Appendix A. Appendix B contains the Orders, Rules Regulations and Forms under the Companies Acts. We have really only one small criticism to make. We regret that the Criminal law is not more complete. Sections 34, 35, and 36 of the Companies Act 1867 are given, but there is no reference to the Penal Servitude Act of 1891 which replaces the portion of the sections correctly given as repealed. Neither is there any reference to the Forgery Act of 1861.

Bailments. By WYATT PAINE. London: Sweet & Maxwell.
1901.

Mr. Wyatt Paine hopes that this treatise "may prove useful to the members of that profession to which he belongs, not only in the United Kingdom but also in that larger Britain." This hope will, we think, be justified, as it is quite evident that a very large amount of labour and ability have been bestowed upon the work, and a great deal of information on legal questions is given in it. We think, however, the work would have been more satisfactory if it had been confined to Bailments strictly so called, and did not range over quite so wide a field. As will be seen by the full title, which is longer than usual, it comprises, among other matters, Carriers and Carriage by Sea and Land; Pledge; Hire; Purchase; Bills of Sale; Deposit; Mandate (with special notes relating to goods in the Custody of the Law, and the nature of the possession of Executors and Trustees in the chattels of their Testators); together with a Compendious Account of the Rights, Obligations and respective Liens of Artificers, Auctioneers, Bankers, Innkeepers, Pawnbrokers, Solicitors, Unpaid Vendors, Warehousemen, etc., etc., and a supplementary chapter on Passenger Carriage, and Appendices of Indian and Australian cases. Some of the subjects he discusses, though interesting and important, do not seem to us to come under the law of Bailments

at all. Mr. Paine considers that a solicitor or doctor can let out their work and labour, and discusses their liability in case of incapacity or negligence. We do not think that the hire of such work and labour is a bailment at all, neither does it come under either of the branches into which Mr. Paine himself sub-divides *Locutio operis*. With all due deference to illustrations introduced into works of authority, we certainly think the rule laid down by Story is correct, namely, "In the common law such agencies and labour and services only are included under the head of Bailments as are employed about personal property entrusted by the owner to the bailee." How can professional work be bailed? Again, we hardly think part of a charge of the Recorder of London to the Grand Jury is an authority as to civil liability for negligence. Mr. Paine has an interesting and instructive discussion on the liability of Bankers with whom valuables have been deposited, although he admits that the view he inclines to is not at present the law of England. The book will undoubtedly be useful for reference on a number of subjects connected more or less directly with the law of Bailments.

The Annual Statutes, 1901. By J. M. LELY. London: Stevens & Sons. 1901.

The Practical Statutes, 1901. By J. COLLON. London: Horace Cox. 1901.

Mr. Lely's annual task has proved much lighter this year than usual. Out of 300 Bills presented to Parliament, "only 40 have received the Royal Assent—a much smaller number than during any year within living memory." Of these Mr. Lely has selected twenty for the purposes of his work. Three of these are of considerable constitutional importance, namely, the Civil List Bill, the Demise of the Crown Bill and the Royal Titles Bill. Mr. Lely gives an interesting and useful historical sketch of the Civil List, and the legislation connected with it, and some information and observations on the Civil List Pensions. The longest and most important Act passed last Session was the Factory and Workshop Act 1901, which consolidates and amends practically all the Factory and Workshop Acts. Attention is called to the new procedure under which it was "piloted" through the House of Commons, and an excellent summary of it is given. All the Acts are carefully annotated, and a good instance of the thorough manner in which the Acts are treated

will be found by reference to the note on the important question as to whether the Larceny Act 1901 is retrospective or not.

Mr. Cotton's annual volume is necessarily smaller than those of previous years, but has evidently had the same care devoted to it as usual. He has selected with hardly an exception the same Statutes as Mr. Lely, and an introduction, when one is required, precedes each Act. It is interesting to have at last caught a slip in a book so carefully edited. The error is a very small one, and, no doubt, clerical, but the income tax for last year was raised to 1s. 2d. not to 1s. 4d. as stated in Mr. Cotton's introduction to the Finance Act.

The Law Relating to Factories and Workshops. By WILLIAM BOWSTEAD. London: Sweet & Maxwell. 1901.

The Factory and Workshop Act 1901 is a most important Act. It consolidates and amends all the statutory provisions for the regulation of Factories and Workshops, and is divided into no less than ten parts and contains 163 sections and 7 schedules. Mr. Bowstead has prefixed to his edition of the Act a most useful introduction. This contains a summary of the principal amendments and new provisions of the Act under no less than 21 headings, many of them of considerable importance. The Act itself is simply provided with notes and cross-references. Many difficult subjects are discussed in the notes, notably several of the decisions on the Workmen's Compensation Act, 1897. The Orders of the Secretary of State granting exceptions, and making special provisions, are also set out under the appropriate sections. In spite of the care which has been taken to explain all difficulties, we are still rather uncertain as to the precise state of the law on the question of overtime in laundries. In the Appendices are the portions of the Acts of 1891 and 1895 relating to dangerous and unhealthy trades and the special rules made concerning them, and also the provisions of the Truck Acts, Education Acts, etc., which relate to the subject of employment in Factories and Workshops. The whole work is very carefully done, and there is an excellent index.

Privy Council Practice. By FRANK SAFFORD and GEORGE WHEELER. London: Sweet & Maxwell. 1901.

No book on Privy Council Practice has been published since

the last edition of Mr. Macpherson's work in 1873. Since then the jurisdiction of the Court has enormously increased, and a very great number of important cases have been decided. The want of an authoritative treatise was much felt, and this the learned authors have supplied. The labour involved in the production of this volume must have been immense. To quote from the preface as to the authorities they have had to collect, "the procedure and practice in this extensive jurisdiction is to be found dealt with in Imperial Statutes, Orders in Council, Colonial Statutes and Ordinances, Charters, Proclamations, Instructions to Governors, and in Orders made by the Judicial Committee. Copies of these documents have hitherto been found together in no one place, for some have been scattered throughout the length and breadth of the Dominions." The work is divided into five parts. Part I. contains the Imperial Statutes, Orders in Council of general application, with Precedents of Forms and of Bills of Costs. Part II. is a Table of Appeals and an account of each particular Possession, Colony, and Foreign Jurisdiction, with rules of appeal and law in force. This part is full of valuable information to lawyer and student of history alike, and is well worth the attention of the general reader for the wonderful picture it displays of the growth of, and various systems included in, our Empire. Part III. contains a treatise on the general practice in Appeals, including full information on the practice of the Privy Council in the case of Criminal Appeals. We think under this last head it would have been advisable to have had a reference to the important case of *McLeod v. Attorney-General for New South Wales*, which gives an excellent illustration of a case in which a criminal appeal was allowed. Part IV. is concerned with appeals from Courts of special jurisdiction, such as Vice-Admiralty Courts, Ecclesiastical Courts, etc. It is interesting to note that an appeal lies from the Court of Admiralty of the Cinque Ports to the Privy Council. Part V. deals with the practice in applications respecting Patents. The mass of information contained in this book is very great, and the care and accuracy bestowed upon its compilation quite remarkable. The book is invaluable to all who practise before that august tribunal, and the general information collected is so far as we know to be found nowhere else.

Title to Realty. By RICHARD C. MACLAURIN, M.A., LL.M.
London: C. J. Clay & Sons. 1901. This interesting sketch

"on the nature and evidence of Title to Realty" is the *Yorke Prize Essay* (1898), and well deserves attention. The history is divided into five periods, *i.e.*, "From the Saxon Invasions to the Norman Conquest, the Norman Conquest to Edward I., from Edward I. to Henry VIII., from Henry VIII. to William IV., from William IV. to present day." The earlier periods seems to us specially interesting. The learned author shortly but clearly sums up the conclusions of the best authorities, English and Foreign, on the difficult subject of the modes of alienation in Anglo-Saxon times, both in reference to "Folkland" and "Bookland," and gives some interesting extracts from some of the "books." He is of opinion that probably "folkland" and certainly "bookland" could be conveyed by will, which has not been the usual opinion. The second period is also interesting, and we are given forms of charters of feoffment, releases, fines, a subject which is excellently treated and examples given from each reign, from Henry II. to Henry III. We may also call attention to the manner in which incorporeals are treated, including advowson, and specially rights of common, and connected therewith the very difficult subject of villainage. All these subjects are illustrated by a selection of leading cases. As Professor Maclaurin proceeds he has firmer ground to tread upon, and more abundant materials to work on, but it requires no little care and skill to deal clearly, yet within the limits of such a sketch as this, with such a subject as the Statute of Uses, and to compress within a reasonable compass the conveyancing statutes of the present century. Professor Maclaurin has, however, been successful in his attempt, and has produced a work which should be undoubtedly of value, not only to students of real property law but all those who take an interest in the history of the land laws. There is a misprint on page 70, where it should read "free to leave the land" instead of "free to leave the lord."

Digest of the Cape Law Journal, 1884-1900. Edited by W. H. SOMERSET BELL. Grahamstown: South African Law Journal. Witherby & Co. 1901. The study of the law of South Africa will probably be more popular in the future; and a book like this one will be very useful to any practitioner who has to consider any questions arising in South Africa. It is a digest very much on the principles of our own digests, and "containing most of the decisions of the

Superior Courts of South Africa for the past seventeen years, with which is incorporated an index of the *Cape Law Journal* for the same period." The references and cross-references seem carefully done, but we have had no opportunity of testing the accuracy of the digests of cases. As might be expected, there are a number of cases connected with *mines and minerals*, and some with *illicit diamond buying*. The names of some of the offences sound truly awful. It would be terrible to be convicted of "*onvoorychtige doodslag*" or of "*afpersing on kuerelarij*." We are glad to find that calling a police constable a "monkey" has been held not to be abusive language.

The Testamentary Executor in England and elsewhere. By R. J. R. GOFFIN, M.A., LL.M. London: C. J. Clay & Sons. 1901. There is much learning and research in this little book, which contains the Yorke Prize Essay for 1901. After explaining Testamentary Executor in Roman Law, Mr. Goffin traces the origin of the Testamentary Executor to the German Law in the combination of the two institutions of the *Vergabung vin Todes Wegen* and the *Salmann*. The history of the Testamentary Executor in England is interesting, as showing the development of the executor's powers at the expense of those of the heir, and the respective influences of the ecclesiastical and secular Courts. There is a chapter devoted to the executor in France, and the executor in Germany; and the differences between the laws in the three countries are remarkable and interesting.

Second Edition. *The Law of Principal and Agent.* By ERIC BLACKWOOD WRIGHT, LL.B. London: Stevens & Sons. 1901.

The law of Principal and Agent is well set out in a convenient form in this volume. The style is clear and the authorities well selected. For a careful and critical examination of some difficult and doubtful questions of law we may direct attention to the chapter on "Ratification," where the difficulties in the principle involved in the decision in the well-known case of *Bolton v. Lambert* are pointed out, and the adverse comments of Sir Edward Fry are referred to. There is a little misprint in this chapter on page 79, where it is said that "a notice of dishonour given by an *authorized* person, though ratified afterwards, was held

to be bad." There is also one in the Index referring to the same chapter — "*gratification* of Criminal Act." The chapter on Remuneration is a particularly good one.

Third Edition. *Law of Libel and Slander.* By HUGH FRASER, M.A., LL.D. London: Butterworth & Co. 1901.

The third edition of this little work has followed rapidly on the second, which was published as lately as 1897. We have noticed no material changes in the present edition beyond the removal of the Forms and Precedents from Appendix A to Appendix B. It contains a large amount of information in a concise form, and seems to be accurate as far as we have been able to test it. We are not convinced by Mr. Fraser's argument that a Report of Judicial proceedings satisfying the provisions of the third section of the Law of Libel Amendment Act, 1888, is absolutely privileged even if *malicious*. We prefer Mr. Blake Odgers's opinion to the contrary. We think it would have been an improvement if there had been a reference to the seventh section of the same Act, in the text when treating of the subject of obscene libels.

Third Edition. *Summary Proceedings in Inland Revenue Cases in England and Wales.* By NATHANIEL J. HIGHMORE. London: Stevens & Sons. 1901. This is not a subject which will appeal to many of our readers, among whom we are afraid we do not number many officers of Inland Revenue or Customs; but it is one of considerable importance, and may at any moment concern any of us, either professionally or personally. Mr. Highmore's official position enables him to speak with authority, though we may perhaps expect him to show a slight leaning to the side of the Crown in doubtful cases, if such there be. Many Statutes have been passed, and cases decided, since 1887, the date of the last edition; and the scope of the work has been enlarged by being made applicable to Customs Cases, as well as Inland Revenue Cases. Besides the law and Forms, it contains useful information as to the examination of witnesses, burden of proof, etc.

Sixth Edition. *Hood and Challis' Conveyancing, Settled Land and Trusts Acts.* By P. F. WHEELER, M.A., B.C.L., assisted by J. I. STIRLING, M.A. London: Stevens & Sons. 1901. A new edition of this excellent work has been rendered neces-

sary by the {number of recent decisions on the Conveyancing and Settled Land Acts, and also by the exhaustion of the previous edition. Owing to the death of Mr. Challis, one of the former Editors, and the inability of Mr. Registrar Hood to take any further part in the editing of this work, the responsibility and labour of turning out the new edition has been entrusted to the competent hands of Mr. Wheeler, with the able assistance of Mr. Stirling, who also co-operated in the preparation of the last edition. The present Editor has been careful to interfere with the text as little as possible, while making necessary alterations, but he has made additions of considerable value in completing the annotation of the Trustee Act, 1893, which considerably increases the usefulness of the book. He has also added some notes to the Judicial Trustees' Act, 1896, and noted up all the recent cases that have been decided on the other Acts contained in this volume, including the few that have been decided on the first part of the Land Transfer Act, 1897. The question of Registration is left severely alone, as being properly the subject of a separate treatise. We might call attention to the important cases which have been decided since the last edition on the Settled Land Act, 1890, and which will be found in their proper place.

Seventh Edition. *Daniel's Chancery Practice*. By CECIL C. M. DALE, CHARLES W. GREENWOOD, SYDNEY E. WILLIAMS and F. A. STRINGER. London: Stevens & Sons. 1901. 2 Vols.

Fifth Edition. *Daniel's Chancery Forms*. By CHARLES BURNEY. London: Stevens & Sons. 1901.

Sixth Edition. *Seton's Judgments and Orders*. By CECIL C. M. DALE, W. TINDAL KING and W. O. GOLDSCHMIDT. London: Stevens & Sons. 1901. 3 Vols.

These three standard works have been published concurrently, and they are so connected by cross-references as to form practically one series, and a series which no Chancery practitioner can afford to be without. It is more than fifty years since the first edition of *Daniel's Chancery Practice* was published, and ever since it has been the work on the subject. A treatise of such a size and detail cannot be republished at very short intervals, but as the sixth edition was issued in 1882-4 it is quite time that a new one made its appearance. Besides numerous less important changes, which have taken place in the practice

during this lengthy period, there are two or three subjects to which the editors especially call attention in their Preface, namely: "the extensive and over-riding effect of Order XXX;" "the extension of the jurisdiction by originating summons, and the consequent development of the practice in Chambers;" and the Supreme Court Funds Rules 1894. The result of all these has been to necessitate much revision and reconstruction of parts of the work. The Statutory Jurisdiction of the Court of Chancery has also been considerably added to of late years. It is, however, rather curious to note that one Act has never given any trouble, namely, the Foreign Laws Ascertainment Act of 1861; as no convention has ever been completed such as would give the Act an operative effect.

Daniel's Chancery Forms is not a new book, though not quite as old as the *Practice*, as it was first published something like forty years ago. Besides the large and excellent collection of Forms ranging from "Reference to the Record" to the last stage of legal proceedings, there are a large number of Forms under the Statutory Jurisdiction of the Court; such as Chancery Trustee Act, Judicial Trustee Act, Finance Act, and ^{Sted.} There are concise summaries of the rules of the ^{cc.} Court and practical notes. This book is intended to be ^{cc.} as a companion volume to the *Chancery Practice* to which it makes frequent reference, but it is none the less a very valuable work by itself. Besides the numerous references to the companion volumes to which we have before alluded, there are numerous references to additional Forms contained in books of special authority on particular subjects, such as Palmer's *Company Precedents*, *Edmunds on Patents*, etc., thus considerably adding to the number of Forms suggested. The last edition was published more than 16 years ago.

The third member of the trilogy is the equally well-known *Seton on Judgments*, originally published as *Seton on Decrees*; it has continued to expand since 1854, in size and popularity, till it is now issued in three portly volumes. As we have said before, it is connected by constant cross-reference with the two other works of the series. A very considerable number of alterations and additions have been made in the present edition, though its last edition is recent compared to those of the other two works we have considered, having been published as recently as 1891-3. Among the Forms that have been altered or added, are money orders under the Supreme Courts Funds Rules,

Mandatory Injunctions, many Forms connected with Companies, and Forms required by the Trustees' Act, 1876, and the Judicial Trustee Act, 1876, and the Land Transfer Act, 1897. In all these cases the valuable notes that are given with each section have also been carefully revised. Besides the large number of Forms given, there are also references to a large number of others given in reported cases, so that every effort has been made, that can well be made, to give the Forms applicable to any case that may arise.

Thirteenth Edition. *Snell's Principles of Equity*. By ARCHIBALD BROWN, M.A., B.C.L. London: Stevens & Haynes. 1901.

Mr. Brown has edited "Snell" for 26 years, and the frequency with which new editions come out prove the steady demand for them. It is a difficult task to keep a book, which faithfully represents the effect of the vast mass of Equity decisions, within a reasonable bulk, but this the Editor has succeeded in doing. In fact, we believe that the present edition is smaller than the last. In spite of the addition of the recent Statutes and Cases. We have not noticed, however, that this desirable object has been attained by the omission of anything of real value.

THE YEARLY LEGAL PRACTICES.

The Annual Practice, 1902. By THOMAS SNOW, M.A., CHARLES BURNEY, and FRANCIS STRINGER. London: Stevens & Sons.

The Yearly Practice of the Supreme Court for 1902. By M. MUIR MACKENZIE, S. G. LUSHINGTON, M.A., B.C.L., and JOHN CHARLES FOX, assisted by A. C. MCBARNET, and ARCHIBALD READ. London: Butterworth & Co. 1902.

These well-known rivals, in one point at any rate, resemble each other this year. They both appear outwardly to be in a single volume, although the *Annual Practice* will be found on examination to have retained its arrangement of two volumes; but these are now printed on thin paper and bound into one. It has, of course, been rendered more portable and convenient for reference, but we think the thinness of the paper makes the notes rather more difficult to read. Besides this important outward alteration, there are a good many internal alterations in the *Annual Practice* to be noticed. The Rules of November, 1900, made some alteration in the practice of the Chancery and Admiralty Divisions, besides in some respects enlarging the powers of District Registries. The

Rules of July, 1901, make important changes as regards solicitors and their clients and other matters of less importance. Besides the new rules, there are two other additions of considerable importance. One is the "Draft Rules for the amalgamation of the Taxing Departments of the Supreme Court with a view to uniformity in the taxation of 'costs.' The other is the Resolutions of the General Council of the Bar upon matters of etiquette, &c. The notes on the two most important subjects—Discovery and Inspection, and Pleading—have been revised by Mr. Edward Bray, and Mr. Blake Odgers, K.C., respectively. All the other notes have been carefully revised where necessary, and to one of the most important, namely, that of the Summons for Directions there is a pathetic prefatory note pointing out the peculiar difficulties under which the writers of notes on Order XXX. labour. However, in this case, the learned writer, who perhaps is Mr. Stringer, has done all that can be done to help the practitioner.

The Yearly Practice has shown by reaching its fourth year of issue that it has come to stay. It differs somewhat in some of its arrangements from its rival, and it is perhaps less full in its citation of cases, and cross-references. The volume, however, contains full information on all requisite points and well deserves its continued success.

The Annual County Courts Practice, 1902. Two Vols. By W. C. SMYLY, K.C., I.L.B., assisted by W. J. BROOKS, M.A. London: Stevens & Sons. 1902.

The Yearly County Court Practice, 1902. By G. PITT-LEWIS, K.C., SIR C. ARNOLD WHITE, and A. READ. London: Butterworth & Co. 1902.

The business of County Courts increases every year and it is well for the practitioner that he is able to take his choice between two such satisfactory manuals of practice as the above. We do not feel that we can help him much in making that choice as both the works under notice have stood the test of many editions and seem to us excellent. There has not been much of interest in the way of County Court Law in the past year; there is hardly more than one new statute to be noted up, and the new cases are mostly those connected with that fruitful source of litigation the Workmen's Compensation Act. These are to be found noted

in their proper place in each of these works, and have necessitated the revision of some of the notes. The laudable endeavour to note the very latest decisions has compelled many of the cases to be added after the letter-press instead of in their proper places and for the same reason some are not included in the list of cases.

The Yearly County Court Practice devotes special attention, as before, to Admiralty practice and gives both "practical hints on nautical matters and also a consolidated and intelligible copy of the complicated 'Sea Rules' now in force." We may call attention to the note on *The Skudeneas* as containing a valuable practical suggestion. Both works deal very fully with the important subject of costs, including the subject of fees under the Treasury Order 1901 and in the *Yearly County Court Practice* is a very useful table of fees arranged alphabetically, prepared by Mr. J. Errington, Registrar of the Carlisle County Court.

•CONTEMPORARY FOREIGN LITERATURE.

La Tradition Romaine sur la Succession des Formes du Testament decant l'Histoire Comparative. By EDOUARD LAMBERT, Professeur d'Histoire du Droit à l'Université de Lyon. Paris, 1901.

This is part of a forthcoming larger work on Comparative Law which the learned writer hopes to publish soon. It may perhaps be advisable to reserve fuller criticism until the appearance of that work. In the present small treatise the view of the author is that text-writers have antedated the use of the Roman will by some three centuries. The ordinary theory of the will as recognised by the Twelve Tables is contrary to the tendency of all early systems.

Azioni ed Eccezioni Cambiarie. By TORQUATO CARLO GIANNINI. Turin, 1902.

This is the second edition of a work which appeared in 1900, under the title of *Cambiale in Giurizio*. It deals with the procedure in actions brought upon negotiable instruments, and is a commentary on Arts. 323 and 324 of the Commercial Code. The author is the learned Chief Justice of the Republic of San Marino and a contributor to the pages of this magazine.

(1) *Caparra*. (2) *Sopra l'Origine ed il Concetto della Compra-Vendita*. Both by MARIO SARFATTI. Milan, 1901.

These two small books deal with important questions of law, and the writer is well qualified for his task. It may be mentioned, for the benefit of those not well acquainted with Italian, that *caparra* or *caparramento* is the *arrha* of Roman Law. According to some jurists, *arrha* was *confirmatoria*, a means of proof, according to others *penitentialis*, a measure of damages for resiling. It is in the latter case damages imposed by the parties themselves. On this basis Signor Sarfatti builds a very interesting discussion, made more valuable for future enquirers in this field by a very full and complete bibliography of authorities on the subject. The last part of the work is occupied with the Italian Code and the decisions thereon. *Caparra* appears to have in Italy rather a penal than a confirmatory function. Art. 1217 of the Code expressly calls it a *cautela*.

The second book points out that the contract of sale implies at once unity of origin and duality of existence. The learned author compares Roman Law with modern codes, and shows that, owing to the exigencies of modern commerce, the Roman rule as to *traditio* has been modified or abolished.

PERIODICALS.

Journal du Droit International Privé. Nos. V.—X. 1901. Paris.

Articles to be noticed are those on the proof of Foreign law, pp. 442 and 672, and on private International law in Japan, p. 632. There are one or two decisions of interest. A foreign workman may avail himself of the provisions of the French Workmen's Compensation law of 9th April, 1898, p. 520. Courts, both in Italy (p. 600), and in Russia (p. 605), have held that a foreign corporation or society (*personne morale étrangère*), unrecognised as such by the law of Italy and Russia respectively, cannot sue in its corporate capacity in either country. The *Tribunal Civil* of the Seine has held that "if a passenger take a through ticket from France to Russia, and his luggage be delayed in delivery in Russia, he cannot sue the French railway company who issued the ticket, where the Russian company is not liable by law for such delay (p. 811).

Deutsche Juristen-Zeitung, 15th July—1st December, 1901.
Berlin.

The number of September 1st contains some of the papers read at the annual meeting of Prussian jurists at Dantzig. It may interest English readers to give the titles of some of the papers, "German advocacy at the opening of the twentieth century;" "The refusal of the oath to non-credible witnesses and the punishment of false statements made not under oath;" "The code of honour of the Bar;" "Ought suspension to be introduced as a punishment for unprofessional conduct?" A lighter vein is struck in a paper by *Ignotus*, on von Ihering's "Heaven of Conception" (*Beyriffshimmel*). The other numbers contain the usual articles and reports of decisions, the whole forming a mass of German law most valuable for anyone who is making a study of a Continental system.

Rivista del Circolo Giuridico Napoletano. March—May, 1901.
Naples.

We welcome this addition to the ranks of Italian legal periodicals. It is only in its first year, and ably edited by Signor Alberto Geremicca, gives a good deal of interesting information as to legal matters in Southern Italy. The most noticeable article is one by Signor Ignazio Tambaro on the open and the compulsory vote. The experience of England and the works of John Stuart Mill are invoked. The number concludes with a criticism of recent decisions in Italy and with a bibliography of recent Italian and French books bearing on the subject-matter of the review.

La Giustizia Penale. 10th June—25th November, 1901.
Rome.

Amid the mass of decisions it will be sufficient to mention one or two which will be of interest to English lawyers, as illustrating the view taken of the law in Italy. In a prosecution for seduction and procuring abortion, the father of the injured woman is not a competent *parte civile* (p. 737). It is a criminal offence to send a

telegram containing the news, false to the knowledge of the sender, that a relative of the receiver's was dead (p. 945). Opprobrious words uttered in public against the late King Humbert do not constitute a crime (p. 907). The editors of the Review appear to have recently established a *Studio Legale*, or Legal Bureau, where cases are taken, appeals prosecuted, and opinions given. We wish the venture all success, contrary as it is to our English habits of thought.

Yale Law Journal. December, 1901. New York and Chicago.

This monthly magazine is well worth the attention of readers of the LAW MAGAZINE AND REVIEW, as being the production of young graduates and even undergraduates of Yale, with occasional help in the shape of articles by more seasoned members of the profession. It is in every way a credit to the Yale Law School. One can only regret the absence of such a periodical in the English Universities. No doubt the differences in the method of the study of law account to some extent for such absence. The main differences are two (1) We have in England very rarely, if at all, anyone who is engaged in active professional or judicial work filling the place of an academic teacher. This is by no means unusual in America. At Yale, for instance, the Hon. Simeon E. Baldwin, a judge of the Court of Errors of Connecticut, is Professor of Constitutional and Private International Law, and Mr. Thacher, one of the leaders of the New York bar, is Lecturer on Corporate Trusts. The effect of this is no doubt to bring the students more into touch with actual practice and so enable them to conduct a magazine which contains *inter alia* a digest of recent cases. (2) In the English Universities, as a rule, a certain list of subjects for examination is published. As long as the student is prepared for the examination, it is generally competent for the tutor to deal with subjects in any order and accommodate himself to the class of mind of the pupil. It is an elastic system. The American system is inelastic. The learning is fixed in strata. The books read in the first year are marked off from those read in the second year. It may be that this system leads to more definite knowledge than ours.

It may be of some interest to note that at Yale the degrees of

B.C.L. and D.C.L. are given with more logical precision than at Oxford. They are reserved for proficiency in Civil Law, or analogous subjects, such as Admiralty or foreign law, and so are comparatively rare. The degrees given after the ordinary law course are those of LL.B., M.L. and LL.D. Surely this is more logical than the Oxford system, in which there is much more English than Roman law in the B.C.L. examination, and in which a thesis on a Roman law subject for the D.C.L. degree has been of late years almost unknown.

JAMES WILLIAMS.

SOME WORKS OF REFERENCE.

The Lawyer's Companion and Diary, 1902. Edited by E. LAYMAN, B.A. London: Stevens & Sons:—This is an extremely handy Diary and work of reference, and is one which ought to find a place on the table of every member of the legal profession. The lists of Barristers and Solicitors are full, and, so far as we can test, accurate, and much information of a useful character is given in the pages of this Diary.

The Lawyer's Remembrancer and Pocket Book, 1902. Compiled by ARTHUR POWELL. London: Butterworth & Company:—The present is the fifth annual issue of this little work, and is in every way up to its usual high standard. The contents have been carefully revised down to date, and the special notes for the year include some on the Law of Agency, Rights of Creditors against Companies, Licensing Law, &c.

The Royal Blue Book, Court and Parliamentary Guide, 1902. London: Kelly's Directories (160th Edition):—Undoubtedly the best and most complete guide of its particular class. The various lists have been thoroughly revised, and the book is now perhaps the most accurate work of its kind. The present edition has again been printed on specially thin paper, which allows the book, despite the fulness of its contents, to retain its handy size.

Whitaker's Almanack, 1902. London: Whitaker & Sons.—*Whitaker's Almanack* is familiar to all, so it is perhaps unnecessary for us to deal with it in detail. It is rightly considered as one of the most useful works of reference and it is one which should find a place in every office, and indeed in every household, where it will often be found useful in settling friendly disputes. Many additions and changes have been rendered necessary in the present issue by the Accession of a new Sovereign, and the honours bestowed for service in the war, &c., but these have all been made without materially adding to the size of the book. Amongst other subjects introduced in the present volume may be mentioned, the Commonwealth of Australia, Submarine Boats, the Housing of the Poor, &c. The Almanack has this year been entirely re-set from new type which gives a smartness and clearness to the contents.

Debrett's House of Commons and the Judicial Bench, 1902, London: Dean & Son:—A very useful Guide. In the Parliamentary section are given biographical details of all Members of Parliament, with illustrations of Armorial Bearings; boundaries of constituencies, etc. The lists are full and accurate, and the information given is reliable. An abridged Peerage and a list of the Privy Council are added in order to render the work a complete Parliamentary Guide. The changes since the General Election of 1900 have been set out apart from the ordinary contents in a form convenient for ready reference. In the section devoted to the Judicial Bench the many recent changes in the High Court and County Courts have all been recorded. The section includes biographical notices of Judges, Recorders, Magistrates, etc., and much other useful information. The whole of the contents has been revised down to the time of publication.

Owing to want of space reviews of several important books have been held over, and will appear in next issue.

Received too late for review in this issue.—Russia: *Its Industries and Trade*, Martin's *Conteypacing in New Zealand*; Lee's *History of Police in England*, MacLennan's *Law of Interpleader*, *English Reports Vol. XIV.*

Other publications received.—Randolph's *The Insular Cases*.

The *Last Magazine and Review* receives or exchanges with the following amongst other publications.—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Madrado Legal Journal*, *Indian Review*, *Kathianan Law Reports*, *The Lawyer (India)*, *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*.

THE LAW MAGAZINE AND REVIEW.

No. CCCXXIV.—MAY, 1902.

I.—LAW IN THE EMBLEM WRITERS.

SOON after the invention of printing the idea of conveying moral lessons in illustrated books became very common. It was no doubt a survival from the old days of illustrated manuscripts and block-type books, such as the *Biblia Pauperum*. The fashion of emblem-books reached its height in the seventeenth century, and was pretty fairly distributed all over Western Europe, the Low Countries perhaps taking the lead in both number and quaintness. For many, including our own Whitney's, the Plantin press was responsible. The influence of the emblem-writers is probably traceable in Shakespeare.¹ They claimed for their work the dignity of at least a quasi-science under the name of "iconography," Cesare Ripa (see below) being the great exponent of this. The writer ventures to think that some researches in an almost forgotten literature may bring to light results of legal interest. He is indebted for many hints to the various works of the late Rev^d. Henry Green.

The word "emblem" is of course not unknown to jurists. *Emblemata Triboniani*, or alterations in the text of the older jurists in order to bring them up to date, are known to all students of Roman Law.² In the Corpus

¹ Green, *Shakespeare and the Emblem Writers*. London, 1870.

² See O. Lenel, *Palingenesia juris Civilis*. Leipzig, 1888 9.

Juris emblemata is used only in its literal sense of ornament embossed on metal cups and vases,¹ and is so explained by Alberici in his *Dictionarium Juris*. In Du Cange only a similar sense is given. The words *icon* and *symbolum* were used as synonyms of *emblemata*.² In the *Corpus Juris* *symbolum* means the Nicene creed.³ It is noteworthy that West's *Symbolography* (1619) was not an emblem-book at all, but an early compilation of conveyancing precedents. Icon, as well as symbol and emblem, was often used for a portrait, and many of the books with names of this kind were merely collections of portraits or illustrations of classical authors, Horace being a special favourite. Emblems were generally illustrations conveying some lesson, moral or otherwise, the meaning being explained by prose or verse beneath the picture.⁴ But they were occasionally used as aids to the student of a subject. One of the most curious works of this class is a book by Johannes Buno.⁵ This is an explanation of the Pandects in the form of emblems. Some of them are very quaint. *Possessoria heredis petitio* is represented by a very ragged *heres* kneeling on a log of wood. *Capite minuti* are illustrated by several men lying without heads. Most of the figures are in the dress of the period; the *prætor* wears the robes of a Restoration judge, the *Comes Orientis* is in full Turkish costume, pointing a long staff towards the rising sun. The *defensor civitatis* is a pikeman of the time, valiantly standing all alone in defence of the spires of Hamburg in the background. *Inofficiosum testamentum* is represented by a huge document so labelled, in

¹ Dig. xxxiv, 2, 17 and 32.

² Symbols and emblems were, however, distinguished by Claudius Minois, the commentator on Alciati, in his *Synlogma de Symbolis*. Antwerp, 1581.

³ Cod. i, 5, 8, pr.

⁴ Cotgrave's definition is, "A picture and short posie, expressing some particular conceit."

⁵ *Memoriale Juris Civilis Romani*. Hamburg, 1673.

front of which a lady much smaller than the document is gesticulating frantically. The book is most amusing and interesting, and the cuts are by no means wanting in a certain rude power.

Some of the most famous books of emblems contain nothing of legal interest.¹ Of those which do, the most interesting is perhaps the *Emblematum Liber* of Andrea Alciati, the great jurist. The first edition was published at Augsburg in 1531, under the title of *Omnia Andreae Alciati Emblemata*, with a commentary by Claudius Minois, in which there is often a good deal of law. For instance, the verse—

“*Obstruere heu nostris undique luminibus.*”

leads him to discuss the right to ancient lights in the Pandects. Emblem lxxxix suggests to him the origin of law. The legal emblems are, xxviii (*tandem tandem justitia obtinet*), xlix (*fraudenti*), l (*dolus in suos*), lii (*doctorum agnomina*). In the latter Alciati gives nicknames to certain contemporary jurists, Curtius is *Canon*, Parisius is *Mæander*, Picus is *Labyrinthus*. In cxlvii and clxxiii he deals with the legal or perverted legal maxims, *quod non capit Christus rapit fiscus* and *delinquentis et suasoris culpam parem esse*. Alciati's book was immensely popular. Up to 1872 there had been published, says Mr. Green,² no less than 179 different editions and translations. Alciati was followed in Italy by Achilles Bocchius³ and Cesare Ripa.⁴ As might be expected in a writer of Bologna, Bocchius has some legal emblems. In the lines explanatory of Symbol cxxvii comes the phrase *semina flexilis æqui*, reminding one of

¹ Such as Joachim Camerarius, *Symbolorum ac Emblematum Ethico-Politicorum Centuria Quatuor* (Mainz, 1712), from which the author was known as *Symbolicus*, as it were the emblem writer.

² *Andrea Alciati and his Book of Emblems*. London, 1872.

³ *Symbolicæ Questiones*. Bologna, 1555.

⁴ *Iconologia* (Padua, 1611), edited and augmented by J. Baudoin. Amsterdam, 1698.

English views as to the flexibility of equity. No. xc is an ass sitting in a judge's chair, with the motto—

“*Judex ineptus peste pejor pessima.*”

The asinine judge's decision is reported. It was to the effect that the cuckoo was a greater singer than the nightingale, because it made more noise. However, the writer makes amends in liii, entitled *imago justi judicis*. Ripa's book contains a mass of commonplaces for the use of orators, poets, and artists, with conventional symbols and explanations. His division of justice was strange. It was either inviolable, rigorous, or divine, each having an appropriate figure to represent it, the rigorous being a skeleton in judge's robes. His division of law is equally curious, natural and canon. Each is represented by a female figure, the former unclad, the latter clad as a nun. Homicide is a truculent looking man carrying a bleeding head; infamy is a woman with crow's wings and the motto *Turpe* on her head-dress. Pardon is a young man breaking a sword.

In England the best known writers are Geoffrey Whitney, George Wither, and Francis Quarles, who were all in more or less close relation to the legal profession. Whitney's book, originally published in Holland,¹ was reprinted in 1866 with an introduction by Mr. Green. The writer collected other people's emblems, and wrote his own verses on them. They do not seem to deal at all with law, though Whitney filled a legal office, being for a time under-bailiff of Great Yarmouth.

Wither was born in 1588, entered at Lincoln's Inn in 1615, and was appointed a clerk in the statute office in Chancery in 1655. Between these dates he published his collection.² Bk. i, 3, is headed:—

“The Law is given to direct,
The Sword to punish and protect.”

¹ *A Choice of Emblemes*. Leyden, 1586.

² *A Collection of Emblemes Ancient and Modern*. London, 1635.

Bk. ii, 7, is a man being broken on the wheel, with the motto *Sequitur sua pœna nocentem*. Bk. iii, 21, is headed :—

“ Be just, for neither sea nor land
Shall hide thee from the royal hand ; ”

a not unnatural opinion from one who had been committed to the Marshalsea for libel in 1613. Bk. iv, 7, is very amusing. It represents a cat in a cage, while all around rats and mice are making havoc with the dishes on a supper table. The verses are :—

“ When magistrates confined are
They revel who were kept in fear,”

and farther down—

“ A tyrannous and wicked magistrate
Is fitly represented by a cat.”

Quarles was born four years after Wither, and published his famous work in the same year.¹ He was also a member of Lincoln's Inn, but apparently not a successful one, as he is said to have exchanged his “inne of court gowne” for a lute case. He extracts a little law from the Psalms. Bk. iii, 10, on Psalm cxliii, 2, represents a Court of Justice. The Saviour sits on the judgment seat, justice acts as prosecuting counsel, and the sinner is condemned and pardoned. The epigram is :—

“ Mercy of mercies ! He that was my drudge
Is now my Advocate, is now my Judge.
He suffers, pleads, and sentences alone ;
Three I adore, and yet adore but One.”

Bk. iii, 15, on Psalm xxx, 10, has the epigram :—

“ My heart, thy life's a debt by bond, which bears
A secret date ; the use is groans and tears ;
I lead not ; usurious nature will have all,
As well the interest as the principal.”

¹ *Emblems Divine and Moral, together with Hieroglyphicks of the Life of Man*, London, 1635.

One of the best-known works of the seventeenth century is the elaborate prose treatise of Diego Saavedra Fajardo,¹ probably suggested by the *Reloj de Príncipes* (Dial of Princes) of Antonio de Guevara. It sets forth in a hundred *empresas* or emblems the duties of a monarch. The mottoes of the emblems are mostly those of Spanish noble families. The theory of the work is that the monarch ought to have, among other qualifications, those of a competent lawyer, like Alfonso el Sabio, otherwise how can he administer justice? The only emblem directly legal is that on p. 122, entitled *His Artibus*. Justice, a plummet hanging from a balance, forms the centre of a crown, and is held in its place by a sword. As the writer explains it, the centre is justice, the circumference is the crown. The prince must not devote his whole time to fighting and doing justice. He must have recreation, and one very strange form of it recommended is distillation, so as to arrive at the properties of matter (p. 37). The writer follows the publicists of an earlier date in his view of the two jurisdictions of the Emperor and the Pope, so familiar to readers of Dante's *De Monarchia*, the *Sachsenspiegel*, and other political works. He cites on the same question, at p. 652, the prologue to pt. ii of the *Siete Partidas*. On the point whether the *duo luminaria* of *De Monarchia*, iii, 1, 4, were once one he pronounces no opinion, but he would certainly not have admitted with Sir John Fortescue that Christ has placed in the hands of His Vicar both swords.²

In France, Gilles Corrozet was an eminent emblem-writer.³ He has a picture of Hercules battling with the hydra, accompanied by a long set of verses to the effect that although a man may win his case, the hydra heads of several sets of costs may arise and dash his hopes. A work of

¹ *Idea de un Príncipe Político representada en cien Empresas*. Monaco, 1640. A Latin translation (Amsterdam, 1651), and numerous other editions.

² *Declarations upon Writings*, Ed. Lord Clermont, p. 535.

³ *Hecatomgraphie*. Paris, 1543.

P. A. Chesneau¹ has a curious legal interest in that the frontispiece puts forth Justinian and Theodora in St. Sophia as models of Christian virtue.

The Netherlands possess so many books of the kind that their very names would fill pages. Jacob Cats was the greatest name, but careful research has failed to discover in his voluminous pages anything bearing on law. The interest of his *Proteus* is of another kind. Two other writers may be taken as examples, and no doubt further researches in this vast field would produce better results. A remarkable religious work is one by the Carmelite, Joseph of St. Barbara.² The reverend author takes a pack of cards and draws spiritual instruction from them. Thus the queen of hearts is the Virgin, the knave is obviously the sinner, the four represents the four last things, and so on. The instruction is here and there blended with legal matters. At p. 127 is the story of a Dutch judge, to whom the plaintiff in an action sent a present of an ox. Not to be outdone, the defendant sent the judge's wife a cow. Judgment having been given for the defendant, the disappointed plaintiff cried, "My ox speaks for me." "Not so," said the judge, "my wife's cow will not let him." At p. 199 is the usual attack on usury, following the words of St. Augustine, *attende quid facit fenerator, minus vult dare certe et plus accipere*. In the following century Florentius Schoonhovius³ had his fling at the profession. No. xxxiv, entitled *in malos causidicos*, is a gruesome picture of vultures picking out the heart of a man who lies prostrate. The epigram of No. lxviii on corrupt judges concludes with the scathing lines—

"Qui nil habet quo torqueat leges miser
In pelle pauper plectitur."

¹ *Orpheus Eucharisticus*. Paris, 1657.

² *Het Geestelijk Kaertspel met Herten Troef* (Antwerp, 1666); the meaning of which is, The Spiritual Game of Cards with Hearts Trumps.

³ *Emblemata partim Moralia partim etiam Civilia*. Gouda, 1718.

One wonders whether any event of the time led to the composition of such verses.

It is remarkable that in none of these writers does there seem to be any allusion to the torture or the oath of the party, two of the most unsatisfactory parts of the procedure of the period, which were already beginning to receive the attention of professed jurists, such as Damhouder, Voet, and Van Espen. Probably both kinds of procedure were regarded by popular writers as too much matters of course for anything to be said about them.

In dealing with emblem literature the reader soon grows tired of the commonplaces occurring over and over again, the rarity of justice, the insolence of office, the law's delay, the instability of fortune. It is a style of literature which has had its day. It probably sufficed to supply a want at the time. But we have long outgrown it, and at present we must have our instruction and amusement on other lines.

JAMES WILLIAMS.

II.—THE JUDICIAL COMMITTEE AND THE INDIAN HIGH COURTS.

IT is unfortunate that at one and the same time questions should arise as to the composition of the chief courts in India and of the final court of appeal from those courts. Nobody denies the competency of the Judicial Committee of the Privy Council to furnish a bench of judges fully competent in every respect, save one, to deal with any Indian appeal that may come before it. In many cases, the lack of information and the assistance which a lawyer, conversant with the life and customs of the people to whom the law has to be applied, might afford, is not seriously felt. But there are cases in which it is otherwise, and the grave divergence between the views of the

Committee and those of the best lawyers in India, on some purely Indian question is naturally accounted for by the composition of the Committee. Certainly, in these latter days, the decisions of the Committee do not command the unquestioning respect that was at one time paid to them, and now that it has lost the two members who possessed the most intimate knowledge of Indian law there is no immediate likelihood of improvement, for it would be rash to hope that the loss suffered can be compensated by the appointments which have been recently made.

Sir John Bonser, the Chief Justice of Ceylon, must, as far as actual experience goes, be absolutely innocent of any knowledge of the peoples of India, their laws, or their customs. His appointment to a seat on the Committee may be justified on other grounds, but it must have been made without any regard to the requirements of India, and indeed this particular appointment is of no practical importance so long as the duties of his office keep him in Ceylon.

Sir Andrew Scoble who, not having held the office of judge "in the East Indies or any of His Majesty's Dominions beyond the seas," cannot be entitled to the munificent allowance of £400 a year for which provision is made in the statute of William, must have been selected on account of his Indian experience, which has been varied and considerable. For many years he was a successful lawyer in Bombay, and subsequently he was the law member of the Viceroy's Council. He has the advantage of a far greater knowledge of Indian litigation than Lord Hobhouse could have possessed when first he joined the Committee. But he is under the disadvantage of starting on a new career at a time of life when many men are thinking of retiring from active work, and of having severed his connection for a considerable period with the practice of the law. It is too much to expect of him that he can

sustain the parts which till recently Lord Hobhouse and Sir Richard Couch have taken in the Council chamber.

Happily, it is still possible that another appointment may be made, for presumably Sir John Bonser does not enjoy a salary, and certainly does not, as did Sir Richard Couch, absorb the two allowances of £400 a year which may be made under the statute. If a retired judge of a calibre entitling him to a seat on the Committee can be found, there is a salary, such as it is, to tempt him, and therefore there is at present no need to despair of seeing some fresh Indian lawyer introduced into the tribunal. If, on the other hand, things have come to such a pass that no such judge can be found, then it might be worth while to consider the expediency of reverting to the old system of assessors, for it is quite possible that there may be persons competent for the position of assessors, and yet hardly fit to occupy a place in the Committee. In one way or another the Committee ought to be strengthened, to enable it to deal authoritatively with the numerous Indian appeals that come before it, and it is hard to believe that, except in shortness of funds, there can be any difficulty in supplying the wanting elements.

The question of strengthening the higher courts in India is not so easily disposed of. There are three classes of persons who can sit in an Indian High Court. Barristers and members of the civil service are essential constituents of a high court, and there may be added a third element in the shape of members of the subordinate judicial service or pleaders. Native judges are generally selected from one or other of these two latter categories. To put the matter in another way, the judges may either be members of the legal profession or civil service. As to these latter, of whom there are at least two in every court, when it is said that they need have no particular training in law, and that they generally adopt the judicial line as a *pis aller*, the only matter of surprise is that the judges are so good as they are.

Two things are clearly wanting if there is to be any improvement in the judges supplied from the civil service. Something more must be required of them than that they should have served for a few years in subordinate judicial posts, and means must be adopted to attract to judicial work a fair proportion of the abler men of the service. As things are at present arranged, the ambitious and able young "civilian" does not dream of devoting himself to legal studies and equipping himself to earn distinction in the judicial branch of the service. He knows that better and more numerous prizes await him if he distinguishes himself as an executive officer. He may act as a judge for a few months now and then, but only because there does not happen to be any better occupation for him at the time. And even if he does deliberately choose to become a judge, generally no obstacle is thrown in the way of his return to executive work, provided always that he has not shown himself incompetent for it. The result is, that the judicial branch, and therefore ultimately the High Court, secures only the less able and ambitious men and the men who, owing to sedentary habits or other causes, are not fitted for executive office.

The problem of securing a training for members of the service in judicial work without increased expenditure is no doubt a difficult one. It is one on which in the Indian fashion oceans of ink have been expended. But surely it ought not to be beyond the wit of man to conceive a system in which beginners could be set to work under the supervision of experienced seniors, and thus gradually raised to the position of judges having an independent charge. At present nothing of the sort is attempted. The young "civilian," who eight, or perhaps even six years after he has entered the service, finds himself the chief judge of a district, with various judges, generally native, subordinate to him, has had no experience in the

practice of the law save what he may have gained as a magistrate. There is nobody to teach him his duties except his clerks; his Bar may or may not be efficient, but probably he would not condescend to learn from them. The mischief of it is, not only that he may do an infinite amount of injustice while he goes through the process of learning his work, but that he compares so unfavourably with the native judges who are subordinate to him. In the latter there has been a remarkable improvement in the last twenty years, while the "civilian" judge has stood still. The native judge of the present time has generally practised as a *vakil*, he devotes himself exclusively to law, and such of them as reach the higher grades are, with few exceptions, thoroughly competent and most painstaking judges. There is little ground for complaint about them, except that they are generally overworked, and in some cases underpaid. Associated with such competitors the "civilian" judge cannot expect to hold his own, unless he too is induced to specialize and to devote himself seriously to law.

It would be a step in the right direction, which surely might be taken without expense, if at a certain stage, some five years or so after joining the service, every man were compelled to elect irrevocably for one branch of the service or another, a certain proportion being of course compelled to take the choice which leads to the bench. As long as things are allowed to remain as they are, it cannot be expected that any additional strength will be brought to the High Courts, in so far as it is recruited from the civil service.

As regards the recruits from the Bar in England, or in India, the question is to a great extent a financial one. Given salaries which cannot be made large enough to tempt men actually or potentially in good practice in England, or men in large practice in such places as Bombay or Calcutta,

the problem is, how to secure, by the prospect of pensions and other advantages, the most competent lawyers. It is clear that the difficulty of securing such men must be greatly increased, if the prospect of a substantial pension is withdrawn, and the liberty of taking leave from the country is curtailed. And yet a condition has recently been imposed, the effect of which must be to deprive any man appointed after he has attained the age of forty-eight of one privilege or the other, while in addition it restricts the area from which selection can be made. The condition imposed is, that no judge shall ordinarily retain his seat in a High Court after he is sixty. It is a condition which may prove inconvenient as regards barrister-judges imported from England, and still more so as regards barristers and pleaders taken from the Indian Bar.

The reason for passing this rule is well known. It was passed in order to prevent the block in the civil service, which, in the absence of an age-limit, was occasioned by the long retention of office on the part of judges selected from the civil service. The rule may have been required, so far as those judges were concerned, in the interests of the civil service, and limited to them it would not have been particularly mischievous. A member of the civil service is generally glad enough to accept a judgeship, and whether or not he holds the office for the full period, he has a substantial pension secured to him. But why the rule should have been extended to barrister-judges, and judges appointed from among the pleaders of a High Court, it is difficult to understand. It can hardly be justified on the principle that a uniform rule should be applied to all the members of the courts, whatever may be their antecedents; for a rule requiring an official to retire at the age of sixty may be reasonable enough when applied to one who has served in India for some thirty years, and yet wholly unreasonable in the case of one who did

not go to India till he was fifty, and therefore has lived in that country only ten years.

Besides, it may well be said that members of the civil service are not, because they happen to be promoted to a High Court, entitled to any prolongation of their official life, and practically that life, when passed in other spheres of activity, never extends beyond the sixtieth year. In extending the rule to outsiders, that is to say, to barristers, who go out from the Bar of England, and barristers and pleaders who have been practising in India, the authorities seem to have forgotten that ordinarily, in England, men are not raised from the Bar to the Bench until after they have, by long practice, proved themselves fit for promotion. There are not many judges who were appointed before they were fifty, and, though some appointments made at a much later age may be said to have been unduly postponed, it cannot on the whole be said that the Bench has been weakened by the absence of younger men. The matter is one in which much the same considerations apply to Indian as to English Courts. Ordinarily, it is not desirable to promote a barrister or pleader to the Bench of a High Court until, by lengthened practice at the Bar, he has shown that he is fit for the office, and certainly the field of choice in India is not so large as to make it safe to exclude the men who are over fifty.

Quite recently a pleader has been so promoted who is much nearer sixty than fifty years of age. The appointment must have been made on the understanding that he must not count on being allowed to retain office after sixty. It is not every man in large practice who would have consented to take office upon such terms, and the Government are to be congratulated upon securing an able and very learned judge in spite of the restriction which they have devised. Having secured a good

judge, they have in effect declared that, after he has had the few years' judicial practice which improves even the best lawyer, he must vacate his seat and retire unpensioned. It is no answer to say that in India judges cannot be expected to retain their vigour and faculties to an advanced age in the same way as they do in England. No doubt that is the case, but if there was any danger of judges unduly postponing their retirement, the remedy is to hand in the power which is reserved to the Government to dispense with the services of any judge at pleasure, for the Indian judge does not hold office *quamdiu se bene gesserit*. Surely it would be much better for the Government to give effect to this power, if necessary, announcing beforehand their intention to do so as occasion may require, rather than to invent a restriction which may hamper them in the selection of judges, and weaken the courts by driving from them the most experienced judges.

This restriction is the more remarkable, seeing that only a few years back another experiment was tried, the effect of which was to prolong the period of service required for the earning of a full pension. This measure, which was really designed to effect a small saving in money, was promptly rescinded on account of its unpopularity, and then the restriction now in force was introduced. Both plans, otherwise wholly inconsistent, agree in this, that they are unfavourable to the maintenance of strong Courts, and therefore it is to be hoped that this new rule will soon go the way of its predecessor.

III.—THE DOCTRINE OF CONSIDERATION.

THE course of history, in the evolution of the doctrine of Consideration in English law, may be indicated in these words of Sir Frederick Pollock¹—"Nobody wanted merely fanciful or gratuitous promises to be made binding without form, and there was no need for haste in defining exactly where the line should be drawn." The leading principle, which shall exactly define the position of that line, still remains to be stated. It is not too much to say that, although the results of the doctrine lie embedded deep in the English law of contract, yet the doctrine itself as generally explained has come to be refined down to terms which barely escape the quality of fiction. If this be so, the question arises—what is that irreducible minimum of reality which survives all these refinements; what is the true expression of principle, which runs through all those decisions upon Consideration that have been upheld to the present day? If the original conception were that of some equivalent or recompense; a *quid pro quo* or a detriment;² how far have we departed from that idea at the present day? One may venture the remark at the outset, that the principle which may be evolved from the cases will be found to eventuate in something distinct from "the notion of some kind of value received as an element" in consideration.³ The nearest approach to a ruling principle which will govern all cases, so far as yet expressed in the books, seems contained in two remarks by Chief Justice Holmes, when he is discussing the essence of Consideration. He says:⁴ "It has not always been sufficiently borne in

¹ *Law Quart. Rev.*, Vol XVII, No 68, p 415.

² *Ibid.*, Vol XVII, No 68, pp 416—418 Holmes, *The Common Law*, pp 253, 268, 287, 289. Anson, *Law of Contract*, 9th Ed, pp 79, 80

³ *Ibid.*, XVII, No. 68, p. 416.

⁴ Holmes, *The Common Law*, pp. 292, 293.

mind that the same thing may be a consideration or not, as it is dealt with by the parties ;” and again, “The root of the whole matter is, the relation of reciprocal conventional inducement each for the other between consideration and promise.” In other words : the parties must have voluntarily entered into a mutual relation regarding something ; and that relation takes the form of reciprocal duties and corresponding rights.¹ The growth of “Consideration,” as applied to “Uses,” is instructive in this regard ;² we have here the will of the grantor, as the foundation of a use ; and the manner in which that will may be evidenced. In an agreement, there is the like process ; but “the existence of a natural duty,” by way of promise, is no more than *nudum pactum* : it is “the mutuality of the transaction” which creates a contract.

It may be worth while, then, to inquire : whether the ruling principal of Consideration be not simply the formation at the will of the parties of reciprocal duties regarding something ; whether the anxiety of the courts to sustain agreements³ has not left far behind the original notion of *quid pro quo* in the sense of some kind of value received. The practical question is : will this principle of “reciprocal duties” govern all cases of contract which, in the light of present experience, have been rightly decided ; does it so express the rationale of the rule, of all formless contracts requiring a consideration, that its application will be an unerring test for the exclusion of “fanciful and gratuitous promises ?”⁴

In endeavouring to elucidate the principle which underlies the doctrine of Consideration, it will be instructive to regard for a moment the evidences which we have of the

¹ Harriman, *Elements of the Law of Contracts*, Boston, 1896, pp. 43, 55.

² *Law Quart. Rev.*, Vol. XVII, No. 68, p. 417.

³ Holmes, *The Common Law*, p. 293. Pollock, *Law of Contract*, 6th Ed., pp. 168, 169. *Law Quart. Rev.*, Vol. XVII, No. 68, p. 416.

⁴ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 415.

inception of contractual obligation in a system other than our own—in that, namely, of the Roman law.

It appears, from amidst the obscurity which surrounds the history of contract in Roman law, that a binding obligation by way of contract began to fill an important place only in the later jurisprudence.¹ In the early days of Rome, before foreign influences and example had begun to corrupt men's minds, "the safeguards of engagement lay to a great extent in the sworn oath or the plighted faith:" and it was from this state of things that those formal observances arose which became necessary "to entitle a man to claim the intervention of the civil tribunals."² Even in these early days, before the promulgation of the Twelve Tables, "there must have been contract and a law of contract,"³ although the remedy for breach of engagement was not directly enforceable. What, then, is the state here depicted? It is that of a community not yet emerged from the condition in which barter was the ordinary means of exchange.⁴ But, it would not always be possible to give "instant delivery of goods on one side against simultaneous delivery" of such and such commodities on the other. The substitute for exchange of goods, then, could be not otherwise than by an interchange of promises, or, of delivery on one side for promise on the other. In each case, it is exchange: in the one case, it is exchange of goods; in the other, exchange of duty or service. It may, therefore, be said: that, as men come to exchange commodities by the medium of price, so do they exchange services by the medium of promise.

So far we have sought for the evidences of contract in the growth of custom: and it may safely be said that, before law stepped in to regulate the enforcement of promises, we

¹ Muirhead, *Law of Rome*, 2nd Ed., pp. 142, 143.

² Poste's *Gaius*, 3rd Ed., p. 343. Muirhead, *Law of Rome*, pp. 50, 143.

³ *Ibid.*, pp. 49, 214.

⁴ *Ibid.*, pp. 49, 262.

meet with contract as a fully developed bilateral agreement, "but meaning no more than barter."¹ Then we come to the period of the Twelve Tables, when it is found that the observance of certain formalities have come "to elevate an agreement to the rank of contract and make it civilly obligatory."² It is to be observed: that, in the most important of these early methods of contracting—that, namely, with the copper and the scales, the ceremony to be gone through had its origin in the exigencies of the public transfer of property by way of barter; but that the main purpose of all these formalities was to ensure deliberation and "certainty as to the nature and terms of the contract."³ A great advance is made with the introduction of the stipulation, "the most important and inclusive form of contract known to the law:"⁴ it is the emergence of the unilateral contract, *par excellence*. "Its introduction marked an epoch in the history of the law . . . stipulations became the complement of engagements which without them rested simply on good faith."⁵

It was thus by the means of the formal contract of stipulation that the bilateral engagement common to the ordinary transactions of life came first to be legally enforceable.⁶ It "came in time to be adaptable to any sort of unilateral engagement," whether by it to be initiated or only confirmed:⁷ advantage was taken of it "to bind a man by formal contract either to do or refrain from doing what in many cases he might already be bound *ipso jure* to do or abstain from doing."⁸

The important thing here to observe is: that the formal contract came in to aid the ordinary transactions of everyday life; and that, although unilateral in form, it could be

¹ Muirhead, *Law of Rome*, p. 262.

² *Ibid.*, p. 143.

⁴ *Ibid.*, p. 145.

⁶ *Ibid.*, pp. 213, 264, 265.

³ *Ibid.*, pp. 128, 144.

⁵ *Ibid.*, pp. 213, 214.

⁷ *Ibid.*, p. 257.

⁸ *Ibid.*, p. 258.

equally well used by way of double stipulations for bilateral engagements.¹ The unilateral contract is seen, therefore, to be a pure creation of law and to be supplemental to those consensual agreements which are the growth of custom. It was through the medium of these formal contracts that, in course of time, the ordinary consensual agreements of daily life came again to be enforceable, but now with a legal remedy, "on considerations of good faith."² The same process may be discovered in the history of the real contracts: in the case of *mutuum*, "the obligation that arose from it was purely unilateral, and enforceable . . . by the same action as stipulation;"³ but the whole transaction was of a bilateral character—a giving and receiving of the *res* completed the contract: in the other three real contracts, as well as the innominate, it is clear that there were reciprocal rights and duties.⁴ "Mutuality between the contracting parties" has been questioned in the case of *depositum* (contracts *re*) and in that of *mandatum* (contracts *consensu*);⁵ but, that the parties to these contracts have reciprocal duties and correlative rights, the Romans themselves have decided by giving the actions *depositi* and *mandati*, *actio directa* or *contraria*.⁶ The *depositum* (probably originating in the exigencies of military service) "was properly gratuitous" but, by a *pactum adjectum*, it became a bilateral convention; and "the gratuitous character of *mandatum* is rather nominal than real."⁷ The sole unilateral conventions are those of the formal contracts, and *mutuum* (with the explanation above noted: "*depositum*

¹ Muirhead, *Law of Rome*, pp. 213, 257, 268—270.

² *Ibid.*, pp. 267, 268.

³ *Ibid.*, p. 269.

⁴ Holmes, *The Common Law*, p. 266.

⁵ *Law Quart. Rev.*, Vol. II, pp. 33—37; Art. by Prof. Grueber, "A difficulty in the doctrine of Consideration."

⁶ Poste's Gaius, 506 (Gaius IV, 47). Muirhead, *Law of Rome*, 2nd Ed., p. 339, note 14.

⁷ Poste's Gaius, pp. 349, 408, 504—507 (Gaius IV, 47). Muirhead, *Law of Rome*, 2nd Ed., 339 note.

commodatum pignus mandatū are called imperfectly bilateral conventions, because they do not necessarily produce reciprocal obligation," but may do so by reason of some occurrences not originally contemplated in the nature of the convention.¹

The same principle of reciprocal duty and trust may be seen in the polity of the Jewish people, where mutual covenants held so high a place in their theocracy. It is the mutuality of the transaction and the observance of good faith which constitute its essential conditions: and the leading motive lies in the exchange of duty and service. We see the same thing in England, during the Middle Ages, in matters cognizable by the Church Courts, where the "words '*ne fidem fallerent*' cover a wide area of moral obligation We find in the Middle Ages that the pledge of faith (*fidei interpositio—fides facta*) was a common sanction to engagements of various descriptions. It was used in certain proceedings in the Exchequer."²

It may be possible now, with these examples before us, to trace out with some consistency the evolution of the doctrine of Consideration in English law. It is manifest that in the inception of contract, English law had much the same state of things to deal with as has just been described in the case of Roman law.³ The earliest cases in which contract makes its appearance apparently arose out of those dealings with property in which goods passed by way of exchange, where "there was a change of property by 'reciprocal grants.'" Thus "the words bargain and contract came to be associated with the action of debt."⁴ It was but a step from this, to make "the breach

¹ Poste's *Gaius*, p. 345.

² Fry, *Specific Performance*, 3rd Ed., Part I, Ch. I, pp. 9, 10.

³ Holmes, *The Common Law*, p. 251. Holland, *Jurisprudence*, 8th Ed., pp. 226—229; 9th Ed., pp. 243—246.

⁴ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 416.

of an active duty" actionable; and this was effected by the action of assumpsit.¹ Now, the action of assumpsit underwent a transformation: from being applicable to rights and duties of a general order, to which all men are bound one towards another and the breach of which sounds in tort, it became applicable to rights and duties of a special order founded on mutual dealings "in expectation of good faith."² Furthermore, we find that "Consideration" began to be heard of about the same time as the action of assumpsit came to be the ordinary way of enforcing simple contracts.³ Chief Justice Holmes has shown⁴ the nature of the difficulty that arose when it became necessary, through the procedure in the actions of debt and of assumpsit, to create a machinery for the enforcement of simple contract. "The conclusion was soon reached that there was a great difference between a contract and an assumpsit."⁵ The question was how, with this machinery only at command, to bridge the difference. The conclusion becomes inevitable that the historical explanation of the doctrine of Consideration lies in the necessity that arose for defining the range of the action of assumpsit when it took the place of debt and came to be applied to the enforcement of simple contracts.⁶ There is no need to seek for a consideration where the essence of the action is a duty owing upon an actual transfer of property, or where a certain thing is promised for a certain thing promised in return;⁷ but it is not so clear that we have all the elements of contract "where the gist of the action" lies

¹ *Law Quart. Rev.*, p. 416. Holmes, *The Common Law*, p. 282.

² Pollock, *Law of Torts*, 5th Ed., pp. 407, 498. Pollock, *Law of Contracts*, 6th Ed., pp. 168, 169. Holmes, *The Common Law*, pp. 274—285, 285—287.

³ Holmes, *The Common Law*, pp. 283—285.

⁴ *Ibid.*, pp. 284—287.

⁵ *Ibid.*, p. 286.

⁶ *Ibid.*, pp. 254, 271, 285, 287.

⁷ Holmes, *The Common Law*, pp. 264, 266, 269, 270, 284, 286, 296. "Afterthoughts on Considerations," *Law Quart. Rev.*, Vol. XVII, No. 68, p. 416.

in the misfeasance or the simple non-feasance of an undertaking. So the doctrine of Consideration came in with a change in the substantive law bound up, "in the true archaic spirit," with questions of procedure.¹ The true criterion of Consideration, then, is the undertaking of reciprocal duties;² but how are we to be rid of the ever varying refinements that are being grafted upon the accepted doctrine, explained as a detriment to the promisee?³ May we not arrive at this consummation by recognising the foundation of contract in the giving and receiving of mutual promises, and by seeing its highest development in the institution of the formal contract, into which all manner of unilateral and bilateral engagements not obnoxious to the law may be resolved? The Scotch system⁴ is simple and effective; but it may not be acceptable on account of its rigidity: the law of England, on the other hand, may err in leaving the door open to the enforcement of certain cases of simple contract whose validity might be quite properly left to the protection of special form. From the substantial *quid pro quo* of the fifteenth century⁵ we have come, by experimental methods, to a realisation of the infinite divisibility of the molecule of benefit or detriment still inherent in the accepted idea of Consideration; so that, at length, it is a little difficult to imagine what of substance there is left.⁶ To ascertain how far this has gone, it will be necessary to review a few of the more typical cases; but, first of all, it may be well to notice some points in a recent discussion by American writers which bear on the same subject.⁷

¹ Holmes, *The Common Law*, pp. 183, 271, 287.

² Fry, *Specific Performance*, Pt. III, Ch. VIII.

³ Holmes, *The Common Law*, pp. 289, 290. Harriman, *Law of Contracts*, pp. 56—58. Watson, *Comp. of Equity*, Vol. I, p. 86.

⁴ Paterson, *Comp. of English and Scotch Law*, 2nd Ed., pp. 154, 157.

⁵ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 416.

⁶ *Ibid.*, Vol. II, p. 37, note by the Editor.

⁷ *Ibid.*, Vol. XVII, No. 68, p. 421, note 2.

This discussion,¹ which bears on some aspects of Consideration, turns chiefly on "an attempt . . . to distinguish" contracts as unilateral or bilateral,² according as the consideration moving from the promisee is executed or executory; that is to say, in a contract, where there is admitted mutuality of promise and consideration, the merely accidental circumstance of concurrent performance of the consideration on the one hand, or promise to perform it on the other, will produce (it is maintained) the essential distinction which exists between an agreement which is unilateral and one which is bilateral. The attempt to draw this distinction loses sight of the fact, that the mutuality of a contract³ remains, as the essence of the contract, even after one side has performed his part; and that the obligation (*vinculum juris*) which remains, for the other side to perform his part, is not to be confounded with that state of things where the obligation, according to the agreement,⁴ is single, and there have been no mutual duties or services to perform. The notion, of applying this terminology in the way indicated, might be passed over as involving nomenclature only, were it not that a peculiar refinement on the doctrine of Consideration has been tacked on to it. It has been stated,⁴ "It will sometimes happen that *a promise to do a thing* will be a consideration when *actually doing it* will not be . . . The reason of this distinction is, that a person does not in legal contemplation incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages

¹ *Harvard Law Review*, Vol. VIII, pp. 27—38; Vol. XIV, pp. 496—508.

² *Ibid.*, Vol. VIII, p. 34; Art. by Prof. Milliston, "Successive Promises of the same performance." *Ibid.*, Vol. XIV, p. 508; Art. by Prof. Langdell, "Mutual promises as a consideration for each other."

³ Holmes, *The Common Law*, p. 327. Holland, *Jurisprudence*, 8th Ed., p. 227; 9th Ed., p. 244. Fry, *Specific Performance*, Pt. III, Ch. VIII.

⁴ Prof. Langdell, *Summary of the Law of Contracts*, Sect. 84; quoted by Prof. Williston in his article, *Harv. Law Rev.*, Vol. VIII, p. 34.

against him for not doing it. One obligation is a less burden than two (*i.e.*, one to each of two persons), though each be to do the same thing." It is difficult to follow out the train of reasoning to the state of things here imagined. But it seems to present a case of "two co-existing promises on one consideration," which has been pronounced to be inadmissible:¹ and has been declared by a well-known text-writer² to be "a state of things manifestly incongruous and nonsensical." Again: why should a *promise to do a thing* have any different effect from *actually doing it*? In any case "the consideration of a promise must always be strictly contemporaneous with the promise itself":³ the detriment to the promisee, which constitutes the consideration, is accomplished in the surrender of a legal right⁴ precisely to the same effect, whether it be by way of promising to do a thing or of actually doing it. "The undertakings of a contract may be for the existence of a fact in the present or in the future. They can be promises only in the latter case; but in the former they may be equally essential terms in the bargain."⁵ Once more: even as "Equity looks on that as done which ought to have been done, or which has been agreed . . . to be done:"⁶ so, "to regard the obligation of a contract, as if the law deliberately gave the promisor the choice between performing his agreement and paying damages, is to overlook the real origin and purpose of the law."⁷ If this be the true position, the attempt to set up a distinction in simple contracts, between the

¹ *Hopkins v. Logan* (5 M. & W. 249); Judgment by Maule, B.

² Broom, *Common Law*, 8th Ed., p. 314.

³ Prof. Langdell, "Mutual promises as a Consideration for each other," *Harv. Law Rev.*, Vol. XIV, p. 506.

⁴ Harriman, *Law of Contracts*, Boston, 1896, p. 56.

⁵ Holmes, *The Common Law*, p. 327.

⁶ Snell, *Principles of Equity*, 12th Ed., pp. 14, 42. *Walsh v. Lonsdale* (21 Ch. D. 9, 14).

⁷ Pollock, *Law of Contract*, 3rd Ed., Introduction, p. xx. Fry, *Specific Performance* Pt. I, Ch. I.

promise to do a thing and actually doing it, so as to involve the question of Consideration, does not seem to have any foundation "in legal contemplation." It would seem, then, that "a promise, made in consideration of the promisee doing or promising to do something which a subsisting contract with a third person has already bound him to do,"¹ is not made with sufficient consideration; that is to say, the doing or promising to do that which a subsisting contract with a third person has already bound one to do is, in respect of all other than the parties thereto, none other in legal contemplation than a past and executed consideration. Professor Harriman, indeed, considers² that such a conclusion seems to produce no desirable results, and he doubts whether it is maintainable either on principle or authority. But, however this may be, it may be questioned whether on grounds of policy³ there appears any practical benefit for including such undertakings, by straining the meaning of Consideration, within the dimensions of simple contract. It will be found generally that, when A. promises something to C. for the performance of C.'s contract with B., there is a further term imported into the new convention by way of consideration; when this is not the case, there will be almost undoubtedly some misunderstanding or concealment which vitiates the whole transaction. The question, then, as the paucity of cases show, is practically of little importance; but, in any event, where the necessity does arise for such a transaction, it seems a fit case for stipulation by way of formal contract, following the example of Roman Law.⁴

It will now be apparent: that it is in the relation of bargaining or mutuality, in a simple contract, that the

¹ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 419.

² *Elements of Contract*, pp. 75, 76.

³ Pollock, *Law of Contract*, 6th Ed., 175—177.

⁴ Muirhead, *Law of Rome*, p. 258.

consideration consists.¹ Consideration, then, carries the idea of relation: value so far does not enter into it.² But the mutual relation of consideration and promise must have reference to something, and that something must be of value: the exchange of duty or service, in consideration and promise, must be real;³ and it must relate to something which shall have appreciable legal value, in order to constitute a simple contract which shall be binding. When it is maintained, then, that Consideration must be "something of some value in the eye of the law," we are immediately met by a class of cases⁴ where the consideration in this sense is not obvious. Yet in these and like cases of difficulty, there will be very little doubt of the presence or absence of Consideration, if we inquire, whether there be a real bargain over something which has some value in exchange. The ruling principle seems to have been expressed with considerable exactness by Tindal, C.J., when he said:⁵ "It was contended that all contracts to be binding must be mutual . . . But we think the proposition, as to the necessary mutuality of contracts, was stated too broadly; and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise."

The conclusion, then, has been reached: that, as the assertion of a principle in the law of simple contract, the doctrine of Consideration, as commonly explained in terms of its historical development, falls short of being the definite expression of an universal rule of easy application: in

¹ Holmes, *The Common Law*, pp. 292—295. Harriman, *Elements of Contract*, pp. 43, 8, 65.

² Pollock, *Law of Contract*, 6th Ed., pp. 169—173. Fry, *Specific Performance*, Part III, Ch. VIII.

³ Anson, *Law of Contract*, 9th Ed., p. 83.

⁴ *Ibid.*, 9th Ed., pp. 81, 90—91. *Law Quart. Rev.*, Vol. II, p. 37. Editorial note.

⁵ *Arnold v. Mayor of Poole* (4 M. & Gr. 896).

drawing the dividing line, referred to at the beginning of this paper, its various refinements have rather tended to obscure the distinction, simple enough in itself, between those promises which are or ought to be considered "fanciful or gratuitous"¹ and those which are given for value. There now only remains to exemplify what has been said by citing a few typical cases; and the selection, for the purposes of this discussion, may be confined to some instances in which a difficulty has been experienced in deciding whether any consideration supports the promise, and in what it consists.

Having regard to the presence of Consideration or its absence, there appear to be four leading descriptions of contract:² there are cases (1st) where the contract is wholly executory; that is, where a promise is given for a promise; (2nd) where the contract is partly executed and partly executory; that is, where an executed consideration is contemporaneous with and made in respect of the promise; (3rd) where the consideration is wholly past and executed before the promise is given; in which case, the contract will fail unless the consideration was given on request and there was an implied promise of reward, although not then put in words;³ and (4th) where the promise is given without consideration; as, for instance, when it is merely voluntary, or given on a "moral obligation,"⁴ in which case the contract will not be supported unless made under seal. Sometimes it may be doubted, to which of these categories a case will belong: and it is with certain of these doubtful cases that it is proposed now to deal.

¹ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 415.

² Holmes, *The Common Law*, pp. 295, 296. Anson, *Law of Contract*, 9th Ed., pp. 83, 98.

³ Holmes, *The Common Law*, pp. 295, 296. Anson, *Law of Contract*, 9th Ed., pp. 103, 105.

⁴ Anson, *Law of Contract*, 9th Ed., p. 85. Pollock, *Law of Contract*, 6th Ed., pp. 165, 167.

First of all, it is important to determine: what Consideration really means, as expressed in the technical language of the ordinarily accepted definition:¹ and there are two cases,² generally cited upon the question of adequacy of Consideration, which are exceedingly instructive in this regard. The first of these cases, where two boilers were given up to be weighed in consideration of their being returned in as good condition as before, was defended on the ground that there was no consideration for the promise to restore them in good condition; and it was decided, that a detriment to the plaintiff lay in his parting with possession of the boilers; and that it was not necessary to inquire what benefit the defendant expected to derive. What have we here as the constituents of the contract? We have, first, the surrender of a right; secondly, a promise to do something in exchange; and, thirdly, the object of the right. We have, then, all the elements of a right³ on the one side, and all the elements of a corresponding right on the other; and these correlative rights and duties are given in exchange the one for the other. The second case is even clearer, as to the corresponding surrender of rights and undertaking of correlative duties, where there was the surrender of a document on the one side and the promise to pay certain bills on the other; and where the comparative value or worthlessness of the object, provided that the respective duties were undertaken, did not enter into the question of Consideration. Here there is no room left for profit or detriment to enter into the conception: duty on one side is consideration for service on the other—an exchange by way of the reciprocal

¹ *Currie v. Misa* (L. R., 10 Exch. 162). Anson, *Law of Contract*, 9th Ed., pp. 80, 83. Pollock, *Law of Contract*, 6th Ed., p. 169. Harriman, *Law of Contract*, pp. 56, 58.

² *Bainbridge v. Firmstone* (8 A. & E. 743). *Haigh v. Brooks* (10 A. & E. 309).

³ Holland, *Jurisprudence*, 8th Ed., p. 80; 9th Ed., p. 86.

surrender of a right the one to the other.¹ There is much wisdom in the remark of Chief Justice Holmes,² "that the same thing may be a consideration or not, as it is dealt with by the parties;" and, "it is the essence of Consideration that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise: conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration." In fine: when one thing is, or is to be, given done or forborne on one side in exchange for another thing which is, or is to be, given done or forborne on the other side, there is the foundation of a contract: whether a transaction is to be taken as voluntary or obligatory³ depends on the undertaking of reciprocal duties in respect to it.

Further observations may be usefully confined to three groups of cases. There are, first, what may be called the *mandatum* cases, of which *Hart v. Miles* (4 C. B., N. S., 371), *Coggs v. Bernard* (2 Ld. Raym. 909), and *Wilkinson v. Coverdale* (1 Esp. 75), may be taken as the types. Two of those cases (*Coggs v. Bernard*⁴ and *Wilkinson v. Coverdale*⁵) will exemplify what has been said of the transition period⁶ in the history of modern contract, when the "difference between a contract and an *assumpsit*"⁷ was being only slowly evolved in the growth of the notion of Consideration,⁸ and when the Courts had "to reconcile or elect between the two principles."⁹ It has been said:¹⁰ that "the relation of the parties in this class of cases is an anomaly in the English law of contract:" and, in discussing the grounds on which *Coggs v. Bernard* was decided, it has been said,¹¹

¹ Harriman, *Law of Contract*, pp. 54, 56.

² Holmes, *The Common Law*, pp. 292, 293, 295.

³ *Ibid.*, p. 295.

⁴ 2 Ld. Raym. 909.

⁵ 1 Esp. 75.

⁶ Holmes, *The Common Law*, 274—287.

⁷ *Ibid.*, 286.

⁸ *Ibid.*, 196, 197. ⁹ *Ibid.*, 197. Pollock, *Law of Contract*, 6th Ed., 168, 169.

¹⁰ Anson, *Law of Contract*, 9th Ed., p. 91.

¹¹ *Law Quart. Rev.*, Vol. II, p. 37; Editorial note.

"Certainly it will not do to say that the bailor's confidence in the bailee is a consideration for the bailee's promise. . . . Our modern account of the matter is, that parting with the possession of the goods is consideration enough. . . . In the case of a gratuitous bailment the theory of Consideration is strained to the utmost, but it does not break." It is hopeless to reconcile this case with principle, except by altering the grounds of the judgment; but there does not seem to be the same difficulty with the other two cases. In *Wilkinson v. Coverdale*,¹ there was a gratuitous undertaking to effect a fire insurance; but there was no evidence of an agreement to procure the insurance as stated, so the plaintiff was non-suited. In *Hart v. Miles*, where the possession of two bills of exchange was parted with, but not for value, in consideration that when discounted the proceeds should be paid out in a certain manner, it was held that parting with possession of the bills was a good consideration for the promise; and Willes, J., in his judgment, besides pointing out the distinction between a unilateral and a bilateral obligation of this sort, said: It is "*do ut facias* or *facio ut facias*," thus clearly showing the bilateral nature of the transaction.¹ In the former of these two cases there is no reciprocal duty, and no consideration; in the latter there are reciprocal duties, and there is consideration.

So far as we have gone, then, we find no exception to the universality of the rule that Consideration is necessary to the validity of every simple contract.² It is no doubt the case that, according to the current view of the quality of Consideration, we may fail to see in "the promise of a gratuitous service" anything done, forbore or suffered, or promised to be done, forbore or suffered, by the promisee in respect of the promise; and may accordingly treat the

¹ Harriman, *Law of Contract*, pp. 43, 54, 56, 58.

² Anson, *Law of Contract*, 9th Ed., pp. 79, 80, 81.

enforcement of such promises as an exception to the general rule. If, however, we look at such agreements, either from the point of view of Roman law or that of the common law as administered by the English courts, we find that they have had added to them, by way of interpretation,¹ an implication of mutual obligation and correlative rights—which, as we have endeavoured to show, is of the essence of Consideration. The second exception, which may be said to derogate from the universality of the rule,² is that of negotiable instruments; but these are in reality subject to a higher law; and, besides being a comparatively recent graft on the common law, possess special characteristics of their own.

There are, secondly, the class of cases in which the promisor is supposed to get nothing more than that to which he is already legally entitled;³ and of which *Foakes v. Beer* (9 App. Ca. 605) may be taken as the type. It will scarcely be disputed by any one reading the judgments in this case,⁴ especially those given by Earl of Selborne, L.C., and by Lord Blackburn, that the decision went on very technical grounds. It was stated by Lord Selborne⁵ that the "sort of benefit" to be derived by the creditor, in case of agreement for part payment in satisfaction of the whole debt, must be "some independent benefit" beyond the fact of "getting payment of part of the money due to him:" yet it will scarcely be denied that the assurance of payment, either in point of time or certainty, is a new term, and is "some new consideration" as much as is the "giving negotiable paper or otherwise." But, the gist of the whole matter is contained in the concluding sentences of Lord Blackburn's judgment.⁶ Apart from the question, whether

¹ Poste's *Gaius*, 3rd Ed., pp. 349, 408.

² Anson, *Law of Contract*, 9th Ed., p. 81.

³ *Ibid.*, 9th Ed., pp. 91—96.

⁴ *Foakes v. Beer* (9 App. Cas., 605—630; 610, 614).

⁵ *Ibid.*, 613, 614.

⁶ *Ibid.*, 622. See also *Harv. Law Rev.*, Vol. XIII, pp. 40, 42; Article by Prof. Ames, "Two Theories of Consideration."

the *dictum* upon which authority seems to have been settled was originally a mistake, Lord Blackburn shows strong reason for doubting the policy of the decision in which he reluctantly acquiesced.

There are, thirdly, the cases in which it is a question whether the performance of or promise to perform an existing contract with a third party is a real consideration;¹ and of which cases *Shadwell v. Shadwell* (9 C. B., N. S., 159) and *Scotson v. Pegg* (6 H. & N. 295) are taken as the type. The topic has been already partially discussed in making some observations on a distinction drawn by American writers between contracts in which the consideration is executed (described as unilateral), and those in which it is executory (described as bilateral): and the conclusion was then reached that practically such cases present difficulties rather of proof than of principle. They are cases in which it is especially true, that the same thing may be a consideration or not according as it is dealt with by the parties.² In both cases,³ it is clear that they can be supported on principle only by aid of a further term, beyond that in the original agreement, being imported into the new convention by way of consideration;⁴ otherwise it is scarcely possible to regard the promise sued upon but as a mere voluntary and unconsidered offer, such as it is the policy of the law to render enforceable only when made in solemn form. But, assuming that consideration can be shown in a case, it does not follow that (if one or other should dispute liability) it will be equally easy to prove consideration on either side.⁵ Take the case already dealt with, where it is sought to prove that doing or promising to do something which one

¹ Harriman, *Law of Contract*, pp. 74—77. Anson, *Law of Contract*, 9th Ed., pp. 96—98. *Law Quart. Rev.*, Vol. XVII, No. 68, pp. 419—422.

² Holmes, *The Common Law*, p. 292.

³ *Shadwell v. Shadwell* (9 C. B., N. S., 159); *Scotson v. Pegg* (6 H. & N. 295).

⁴ *Law Quart. Rev.*, Vol. XVII, No. 68, p. 420.

⁵ Holmes, *The Common Law*, p. 293.

is already under contract with a third party to do is sufficient consideration for a further promise; in this case, in order to recover on the promise in the new convention, it will be necessary to show that the doing or promising to do is not merely the carrying out of the previous contract; else there would be "two co-existing promises on one consideration."¹ If, on the other hand, the point of Prof. Langdell's argument² be, that "a promise to A. and a promise to B. [to do the same thing] cannot be *one* consideration;" it would seem then that the whole case is given away, and that the second promise is in reality something different from the first. The consideration must be real,³ but a mere repetition of the same promise to A. and B., without more, would be illusory as a consideration in respect of any correlative promise by B. Now, take the converse case,⁴ where it may be sought by Peter, in consideration of a promise or performance made by him to John, to enforce as against John something which he has promised to do, but which he has already also promised William to do; in this case, the question is not that of the validity of two co-existing promises on one consideration, it comes to be a question whether there be any added assurance of performance in the new convention; if so, it will be enforceable by Peter as against John; for, there will be a new consideration moving from John and ensuring the mutuality of the new convention. If John (a builder) engages to build a house for William, to be completed by a certain date, and William lets the house to Peter from that date; Peter, if he sees the building at a standstill, may wish to supplement his rights as against William by obtaining some further assurance

¹ *Hopkins v. Logan*, (5 M. & W. 249).

² Langdell, *Summary of the Law of Contract*, Sect. 84.

³ Anson, *Law of Contract*, 9th Ed., p. 83.

⁴ *Law Quart. Rev.*, Vol. XVIII, No. 68, p. 421.

from John that the house will be completed by the day appointed; if Peter, then, by the payment or promise of payment of £100 extra enables John to overcome the difficulties with his workpeople, he has not only the expectation of good faith in the performance of the original contract by the day appointed, but the right of added assurance in consideration of his own promise. There can be little doubt, therefore, that Peter should have a right as against John to a performance of the contract entered into between John and William: and it follows, as a necessary consequence, that John should have a corresponding right as against Peter in respect of his promise; but, although "in an agreement by mutual promises both promises are binding or neither," yet it may not be so easy for John, if Peter should dispute his liability to show that, in performing his contract with William, he (John) had any consideration to offer for Peter's promise.

These cases,¹ then, appear to have been rightly decided; but, presumably, they would be approved at the present day on somewhat different, or more explicit, grounds. The distinction drawn by Professor Langdell² is not needed as a test of the validity of this type of cases; and, as an explanation, it fails to show what the consideration really is.

The endeavour has been made to show, that difficulties arise in applying to simple contract a rule of construction which fails to take note of the reciprocal relation of its parts, by seeking for consideration in a benefit or detriment on one side or the other. It may not be possible, by means of any definition of Consideration, to state a rule of construction which shall be easily applicable to all cases as they arise; but it may be some advance on the

¹ *Shadwell v. Shadwell* (9 C. B., N. S., 159). *Scotson v. Pegg* (6 H. & N. 296).

² *Summary of the Law of Contract*, Sect. 84. *Law Quart. Rev.*, Vol. XVII, No. 68, pp. 419—422. Pollock, *Law of Contract*, 6th Ed., pp. 175—177.

ancient doctrine, to recognise in Consideration that element in simple contract in virtue of which there exists an undertaking of reciprocal duties or services in respect of an object which has some value in the eye of the law; and which may commonly be described as the surrender of a right by one party in exchange for a promise to do, suffer, or forbear, by the other party, or *vice versa*.

RANKINE WILSON.

IV.—CRIMINAL STATISTICS, 1899.¹

THE criminal statistics for 1899 form a volume of more than usual interest and value. The introduction is written by Master Macdonell, C.B., of the Supreme Court, and contains a remarkably full and able discussion of certain important points arising out of the statistical tables. The value of such guidance is well known to everyone who has ever dealt with similar statistics. Without something of the kind to focus the inferences to be drawn from the tables, the great mass of figures which they present is of comparatively little use. To go to them for the answer to a definite and limited question is one thing, but few, and those only with much labour, could, without such aid as the introductions afford, arrive at a satisfactory conclusion as to the general results to which the figures lead.

Master Macdonell's introduction deals with several subjects, of which the most important are—(1) the amount of crime in 1899: (2) movements or variations in certain crimes: (3) certain classes of criminals.

The year 1899 is remarkable for the comparatively small amount of crimes known to the police. The total number

¹ *Judicial Statistics, England and Wales, 1899.* Part I.—Criminal Statistics. London: Eyre & Spottiswoode.

was 76,025. This is more than 3,000 less than the average for the five years 1894-9, and is more than 20,000 less than the average for the five years 1880-4. It is not a casual decrease, but marks the lowest point of a steady diminution. And it should be remembered that this diminution of the number of crimes has gone along with an increase of the population. The actual number of crimes has diminished: the number in proportion to the population has diminished still more rapidly. For the years 1880-4 the proportion was 367·50 crimes for every 100,000 people: for 1895-9 it is 255·73, a drop of over 30 per cent.

But though this decline is part of a continuous process, it may very possibly have been exceptionally rapid in 1899. The numbers for 1898 (82,426) were higher than those for the three preceding years, and the total may perhaps rise again in future years towards the 1898 figures. The special circumstances of 1899 may account for an unusually small number of crimes. It was a year of great prosperity: wages rose, and work was abundant. At the same time the calling out of the Reserves threw open a great deal of employment, and many experienced chief constables are of opinion that the mobilization of the Militia did much to diminish crime, partly by keeping militiamen employed, partly by removing undesirable characters. It is certainly noticeable that the decrease was more marked in the latter half of the year, and was especially conspicuous in December.

It must not be forgotten that these figures are those of crimes *known to the police*, and that there is necessarily some uncertainty as to their relation to the actual amount of crime committed. It is extremely difficult to form an opinion as to what this latter really is. It is possible that some of the recorded crimes for which no one is brought to trial may not really be crimes at all. Some charges of rape and similar sexual offences may be mere hysteria: some cases of violent death put down as murder may be really

suicide or accident. It is certain, on the other hand, that there must be many crimes committed which are never known to the police at all. Some murders, particularly child murders, must pass for accidental deaths: many cases of theft are never prosecuted, the employers being satisfied simply to dismiss the offender. In many cases of fraud and the like the victim is ashamed to prosecute, or does not think it worth while to take the trouble.

All these causes must, of course, have affected the figures of crimes known to the police in past years also, with which the comparison lay. But it is open to considerable doubt whether the ratio between the crimes committed and the crimes known to the police remains constant. It is frequently maintained that the decrease in crimes known to the police does not imply a corresponding decrease in the crimes actually committed, but is accounted for, at any rate in part, by a growing reluctance to prosecute, partly on humanitarian grounds, partly from a dislike of the time and trouble involved. This is a view which is taken by many persons of great experience, and it is adopted by the editor of the statistics for 1898.

It is, however, from its nature incapable of statistical proof or disproof; and it must remain a matter of personal inference. But even if we make large allowances for this reluctance to inform or prosecute, it must be remembered that there are counterbalancing influences at work. Certain crimes are regarded by public opinion as more heinous, and therefore reported more readily than they used to be. Cruelty to children is a striking example of this. In 1893 the number of persons tried for this offence was 2,229. It has since been steadily rising, and for 1899 was 4,270. This almost certainly represents not a real increase in the number of cases of cruelty, but a greater desire among the public generally to put it down. In this connection it is significant that the Society for the Prevention of Cruelty to Children,

in their report for 1898-9, state that 16,468 cases were reported by the general public, 6,796 were reported by the police, and 4,901 discovered by the Society's inspectors.

Moreover, the modern tendency to substitute summary procedure for indictment wherever possible, with the accompanying simplification of procedure and shortening of sentences, helps to counteract the reluctance to prosecute. The coming into force of the Summary Jurisdiction Act, 1879, was marked by a considerable rise in the total number of prosecutions.

We do not think, therefore, that there is any reason to doubt that there has been a real decrease in the volume of crime which is still going on. The annual average of crimes reported to the police has sunk from 96,780 in 1880-4 to 79,459 in 1895-9. In the former period there were 367·50 such crimes per 100,000 population, in the latter 255·73. It is, to say the least, very improbable that humanitarian or indolent reluctance to prosecute has increased to such an extent as to account for so great a diminution.

It is true that there was in 1899 an increase in the number of summary prosecutions. Excluding summary prosecutions for indictable offences, there were 761,322. The average for the five years, 1895-9, was 700,517, and the average for the preceding five years was 642,041. For the most part, this is not a matter for serious concern: many of the offences punished summarily are only criminal in a technical sense. Thus, there were 89,000 prosecutions for breaches of the Education Acts, 128,000 for offences against police regulations, and 27,000 for offences relating to dogs. The borough and county bye-laws (by which is chiefly meant "police regulations") account for a very large proportion of the increase—nearly 14,000 out of a total increase of 17,000. Considering the nature of most of the offences in question—*e.g.*, driving at night without lamps, singing in the street after a request to

desist, hawkers shouting to the annoyance of residents, throwing orange-peel or broken glass on the street, &c.—and the number of fresh bye-laws and sets of bye-laws which are made every year by local authorities, this increase is neither surprising nor alarming.

But among the figures of summary proceedings there are some which certainly point to serious and very possibly growing social evils. One of these is an increase of prosecutions for drunkenness, the other an increase of prosecutions for gambling. Prosecutions for drunkenness (which, as the Editor remarks, are probably a better test of the prevalence of the offence than convictions) were 202,498 in 1898: they rose to 214,298 in 1899. Part of this increase must unquestionably be put down to the exceptional prosperity of 1899: the prosperous years 1872-6 also show a great rise in the figures of prosecutions for drunkenness, which fell again from 1887 to 1891. Part also is probably due to increased police activity in certain places. At the same time it is unpleasant to note that the figures show a steady increase since 1895. And it should be borne in mind that these figures by no means give the total amount of drunkenness. At the most they give the amount of *illegal* drunkenness; and in addition an unknown (but certainly very large) proportion of the persons who commit more serious offences do so under the influence of drink. In Manchester, during the years 1898-9, 1,682 people arrested on other charges were drunk at the time of arrest.

The statistics of prosecutions for gaming form a most disquieting commentary on the constant complaints which we read of the growth of a gambling spirit in the population. For the years 1880-4, the annual average of proceedings under the Vagrancy Act for gaming was between 10,000 and 11,000; for 1890-4 it was 15,039; but for 1895-9 it was 22,324; and in 1899 the actual number was 24,578. And this increase is even worse than it appears,

for in the earlier years the figures include other offences besides gaming, for which latter no separate figures were given before 1893. The true average for the earlier years probably did not exceed 8,000 or even 7,000.

In connection with the question whether crime is or is not decreasing a point of great interest arises. What proportion of crime is committed by a distinctively criminal population, and is this population on the increase? In the introduction to the statistics for 1897, reasons were advanced for believing that crimes of dishonesty were falling more and more into the hands of a small class of professional criminals, whose numbers were not increasing. Of course there is some difficulty as to the definition of professional criminal: it may mean any man who has committed several crimes for purposes of gain, or (more strictly) one who makes his living entirely or principally by crime.

Master Macdonell applies several tests to the figures in order to ascertain what number of professional criminals exists, and whether it is on the increase; and he arrives at the general conclusion that "there is no reason to think that professional criminals are greatly increasing: some kinds of such criminals are probably diminishing."

The first and most obvious source of information is the police return of the number of habitual criminals known to be at large on a given date each year. This has diminished steadily since 1893. In that year it was 7,509, or 25·26 for every 100,000 population: in 1899 it was 5,749, or 18·10 per 100,000. It is interesting to compare these figures with the return of habitual offenders known to the police prepared for the Constabulary Force Commission of 1837. This gives 14,797 for London and 3,125 for Bristol. The figures of the 1899 return were 1,131 and 41 respectively. These returns cannot be implicitly trusted; but allowing for the enormous increase of population since 1837, it can

hardly be doubted that they point to a substantial decrease of the habitual criminal class.

This conclusion may be further tested by examining the records of persons tried for certain offences which are peculiarly affected by professional criminals. The Editor takes four groups of such offences—coining, receiving stolen goods, robbery, burglary, with housebreaking, &c. As to the first three of these, there is an undoubted and very marked diminution. The annual average of persons tried for coining has sunk from 314 in 1880-4 to 107 in 1895-9; for receiving stolen goods, from 384 to 281; and for robbery, from 307 to 264.

With regard to burglary and kindred offences the figures are not so clear; the annual average has increased from 5,528 in 1880-4 to 6,798 in 1895-9. But it is extremely doubtful how far this represents an actual increase of crime. House and shop-breaking are separated from larceny by narrow legal distinction. Many cases may be classed either to one or the other; and the sudden application of a different principle of classification may produce a startling change in the figures. For example, in 1878 there was an apparent increase of 1,674 in burglaries and house and shop-breakings in the Metropolitan Police District, but this was in great part a mere transfer of cases from the category of larceny to that of burglary or housebreaking.

Another test is the proportion of prisoners with previous convictions. This, however, is obviously a very rough one: there are convictions and convictions, and the fact of having previously been fined for cycling on a footpath would not weigh heavily against a prisoner on his trial for burglary. Or, take the case of a man who has two convictions for serious offences separated by several years' interval. He might be either a professional criminal who had succeeded for several years in escaping conviction, or a man who, after his first offence, had lived honestly for years until he was overcome by sudden temptation.

But such as it is, the test has been applied. The Editor gives three tables, one showing the proportion of prisoners with three previous convictions, another the proportion of prisoners convicted twice or more of the same offence, and a third giving the number of prisoners sentenced twice or more to penal servitude. The first table shows small fluctuations: the per-centage to total convictions was 48·34 per cent. in 1890, 52·67 in 1896, and 50·89 in 1899. The second shows a steady rise from a per-centage of 65·7 in 1893 to 70·8 in 1899. The third, like the first, gives fluctuating results: 9·73 per cent. in 1893, 11·23 in 1895, and 10·66 in 1899. Neither of these, probably, points to any real increase; the difference is to be explained partly by recent improvements in means of identification, still more by the great reduction in the length of sentences.

The Editor reinforces his conclusions by a reference to the value of the property lost by burglary, theft, &c. He remarks with considerable force that the number of professional criminals must in the long run be regulated by the amount to be made out of the profession. Now the aggregate net loss of property by felony is not large: in 1899 it was £88,406 in the Metropolitan Police District, or about 3*d.* per head of the population. In Manchester and Birmingham it was 2*d.* per head. The annual loss fluctuates, but shows no signs of a permanent increase. This lends support to the general conclusion that the number of professional criminals is not largely increasing.

The next branch of the subject dealt with is the movements or variations in certain crimes or groups of crimes, which are subjected to a more detailed examination.

The first of these is offences against the State. The numbers are extremely small. There has been no case of treason or treason-felony since 1885. Riot and similar offences are also few, and apparently declining. There were no cases in 1899, and the average for the five years,

1895-9, was 21, as against an average of 59 for 1890-4, and 66 for 1885-9. The real significance of these figures is only seen, however, when they are compared with those of 50 or 60 years earlier. Between 1836 and 1845 the lowest number of persons tried for riot and rescue in one year was 1,693 in 1837, and in many years there were over 4,000, the highest number being 5,673 in 1843. There could not be a more eloquent testimony to the decrease of lawlessness among the population than these figures. It is, however, only fair to our grandfathers to say that the years taken mark a period of special and severe distress for the poorer classes, and the repeal of the Corn Laws was instantly followed by an enormous fall in the number of such offences. For the years 1846-50 the annual average of persons tried for riot and rescue was only 394, a tenth of what it had been for the preceding years.

The analysis of the figures relating to homicides, *i.e.*, murders and manslaughters, is especially full and interesting. The numbers fluctuate to some extent from year to year. In 1899 there were 322 homicides known to the police, for which 271 persons were tried and 123 convicted. But when you come to examine the figures for a series of years it is at once obvious that the number of homicides in proportion to the population is steadily decreasing. In the years 1862-6 the annual average of cases known to the police was 1·77 per 100,000 people, and of convictions ·75: for 1894-8 the annual average was 1·05 and ·36: for 1899 the proportions were 1·01 and ·39. The most striking thing about these figures is the very small proportion which they bear to the total number of deaths by violence. As we have seen, the homicides in 1899 amounted to 322, and the average for the five previous years was 323. But the total of violent deaths is given by the Registrar-General as 21,815, and there were 2,811 suicides. Another striking feature is that there are very many homicides for which

no one is ever punished. The number known to the police in 1899 was 322, the number returned by coroners' juries was 285; but there were only 271 persons tried and 123 convicted. It is clear that a very large number of homicides go unpunished, and some uninvestigated. During the years 1884-99 5,564 cases of homicide were known to the police, but there were only 4,107 trials—25 per cent. fewer. It must be recollected, also, that a certain proportion of the cases of death returned by juries as accidents or open verdicts are no doubt really murders; and that babies are probably often murdered without any suspicion arising that the death is other than natural. On the other side, a certain number of murderers escape proceedings by killing themselves, and others are found to be insane. In some of the cases entered as murder, also, the prisoner is actually found guilty of concealment of birth. In this connection it is noteworthy that more than 30 per cent. of the persons murdered are less than a month old.

The proportion of persons tried, to verdicts of homicide returned, by coroners' juries has been steadily rising for the last fifty years. For 1857-61 the annual average was 72·3: for 1894-8 it was 82·2: in 1899 the proportion was 94·8. But there undoubtedly remains a considerable residuum of cases of homicide known to the police which are never cleared up, and in spite of the diminution indicated by these figures that residuum is not likely to be done away with yet.

The figures as to other crimes of personal violence may usefully be considered in connection with homicide, to which they are closely related. Homicides and assaults of all kinds taken together may fairly be presumed to indicate the degree of lawlessness existing in the community at any time.

Now the highest annual average of persons tried for wounding and assaults since 1857 was in the years 1872-6,

100,541. Since then it has steadily declined, until for 1897-9 it was 73,308. In proportion to population the decline is of course much greater—from 423·78 to 233·34 per 100,000 persons.

No doubt, as the Editor points out, many assaults are compromised, and so do not appear in the statistics; but his inference seems to us to be thoroughly sound: "On the whole the above facts seem to indicate a great change in manners: the substitution of words without blows for blows with or without words: an approximation in the manners of different classes: a decline in the spirit of lawlessness."

The statistics of suicide are much less encouraging. We have already seen that the annual average of deaths from suicide is eight or nine times as great as that of homicides. It now appears that suicide is increasing both absolutely and in proportion to the population. For 1857-61, the annual average of suicides was 1,309, or 6·6 per 100,000 persons: of attempts to commit suicide, 172: for 1897-9 it was 2,825·6 or 8·8 per 100,000, and 2,067 attempts. The increase is practically as great in the case of women as of men. Although far the greater majority of suicides are men, the proportion of women to the total number remains practically steady at about 25 per cent.

Suicide appears for the most part in elderly people. Among men there is a great increase in the rate of suicide after the age of 35, and the decade most prone to suicide is that between 55 and 65. With women, on the other hand, there is not the same marked rise in the rate after 35: women commit more suicides at a comparatively early age than men. It is curious, however, that attempts to commit suicide are more frequent at an earlier age than actual suicides. The maximum incidence of attempts is between 30 and 40 in men, and between 21 and 30 in women. There has been an increase both in suicides and attempts, but it is noteworthy that the attempts appear to

follow different laws in respect of their distribution and increase.

The figures do not altogether bear out the common assertion that suicide is especially prevalent in great towns. 31 great towns, each with more than 88,000 population, showed 9·05 suicides and 12·12 attempts per 100,000 population; a group of 43 smaller towns, with populations from 34,000 upwards, gave a rate of 4·96 suicides, 5·90 attempts; while the rest of England and Wales gives 9·84 suicides and 3·27 attempts. It will be seen that the only point in which the large towns are definitely inferior, both to the smaller towns and the country, is in the large per-centage of attempts. In respect of actual suicides the group of large towns, although worse off than the smaller towns, is rather better off than the rest of the country. And it is noteworthy that in the same way London stands better than the rest of England and Wales, exclusive of the chief towns, in the matter of actual suicides (9·50 as against 9·84).

We have already spoken of the increase in the number of persons tried for cruelty to children. It is of importance to note, that although the total number is increasing, the more serious cases are diminishing. The number of persons tried for aggravated assaults on women and children has fallen considerably since 1891, both absolutely and relatively to the population. A very interesting evidence of this tendency is found in a table borrowed by the Editor from the Report of the Society for Prevention of Cruelty to Children for 1895-6. It gives the proportion of cases of violence to children as distinguished from neglect of children. In 1884-5, the cases of violence were 55·8 per cent., of neglect 31·6 per cent. This proportion has steadily altered, until in 1895-6, the proportion was—violence, 18·3, neglect, 73·1.

As to the local distribution of these offences, the statistics this year contain some valuable figures. The country has been divided into 4 groups, the Metropolitan Police District,

30 large towns, 43 smaller towns, and the rest of England and Wales. The difference in the figures for these groups is enormous. Taking the annual average for 1894-9, the proportions per 100,000 population are—rest of England and Wales, 8·55; Metropolitan Police District, 8·94; 43 smaller towns, 18·21; 30 large towns 23·14.

The next group of offences dealt with is that of crimes against good morals, or sexual offences. It is unfortunately the fact that these offences are on the increase. In the case of rape and indecent assault the increase is particularly marked. The average of cases reported to the police for 1867-71 was 534; of prosecutions, 422: for 1897-9 the average of cases reported to the police was 1,019, of prosecutions, 607. The discrepancy between the number of cases reported and the number of trials in the case of this group of offences is very noteworthy: it may represent the difficulty of procuring conclusive evidence in such cases, or it may perhaps be connected with the fact that it is very easy to bring false charges of these crimes. Unnatural offences also show a tendency to increase: including attempts, the average for 1872-6 was 138 cases reported to the police, and 95 persons tried: for 1897-9 it was 195 cases reported and 160 persons tried. The increase in all these cases is not only absolute, but proportionate to the increase of population. The proportion per 100,000 has risen from 3·31 cases reported and 2·76 persons tried in 1872-6 to 5·35 cases reported and 3·57 persons tried in 1897-9.

It is commonly said that crimes against good morals are peculiarly rife in large towns. The returns have been examined to see if they throw any light on this view, and though the large towns do come out somewhat worse than the country generally, the differences are small. The proportion of offences against good morals per 100,000 is, it will be remembered, 5·35 for the whole country. For

London it is 6·89; for the thirty largest towns it is 4·40; for the rest of England and Wales it is 5·44.

Under the heading "certain classes of criminals" some particulars of great interest with regard to female criminals and juvenile offenders are to be found.

It is well-known that female criminals are far fewer than males. The per-centage of women in prison in 1899 was 29·32 of all prisoners: the per-centage of convictions of women to the total number of convictions was 11·70 at Assizes and Quarter Sessions, 23·89 for summary trials. It is curious that while the per-centage of summary convictions of women is practically stationary, and the per-centage of women convicted on indictment is slowly falling (it was 13·07 in 1893), the per-centage of women committed to prison is steadily but slowly rising (from 26·91 in 1893 to 29·32 in 1899).

As might be expected, the convictions of women are very unevenly distributed over the list of convictions. Some crimes they almost monopolise, *e. g.*, abandoning children under 2 years (100 per cent.), concealment of birth (91·18), child stealing (75·00), cruelty to children (61·02). The proportion of women convicted for murder was 31·03, which corresponds remarkably closely with the proportion (30 per cent.) of murders of infants under one month. The proportion for manslaughter was 25·53.

In offences against property, the proportion is generally not high. The only offences for which it is at all considerable are extortion by threats to accuse—25·00, larceny from the person—26·66, and larceny in house—20·00. For habitual drunkenness the proportion is exactly 50·00 per cent. It is interesting, however, to observe that, so far as they are any guide, the statistics lend no support to the common allegation that drunkenness is on the increase among women. The proportion of women to the total

number of persons prosecuted for this offence has been almost stationary since 1890—at about 23·50 per cent.

Of almost greater importance to society is the question of juvenile crime. Master Macdonell subjects the returns to a very careful examination, and arrives at the conclusion that juvenile crime has not increased to any considerable extent, and has probably diminished along with other crime. But the figures are subject to so many qualifications that absolute certainty is not attainable. What is certain is that the number of children and young persons in prison is rapidly diminishing.

There were only 25 children under 12 years committed to prison in 1899: between 12 and 16 years there were 1,358, or 0·877 per cent. of the total commitments. This marks a large decrease since 1890, when the number was 3,872, or 2·504 per cent. But the real significance of the figures only comes out when we are reminded that in 1856, 11,808 boys and 2,173 girls under 16 were committed to prison.

There was also a marked decline in the number of persons between 16 and 21 committed to prison. In 1899 there were 15,212 (9·83 per cent. of the total), which is a decrease of 33·82 per cent. since 1890.

These figures, however, do not mean that juvenile crime has decreased to so great an extent as this. They point to a change in the policy of the law towards juvenile offenders. It is necessary to take into account as well (1) the number of boys and girls sent to industrial schools and reformatories; and (2) the number of juvenile offenders released under the Probation of First Offenders Act 1887, and the Summary Jurisdiction Act 1879. The latter element can only be estimated, as no statistics exist of the proportion of juveniles among the persons so released, though it is undoubtedly high. Master Macdonell estimates it at 20 per cent., and upon this basis works out the total numbers of juvenile offenders. He puts it for 1899

at 51,639, or 162·57 per 100,000 population. The corresponding figure for 1898 is 55,287, or 175·98 per 100,000.

There are one or two points not mentioned in the Introduction which deserve some attention. One of these is Table XXXIX, which gives particulars of the terms of detention inflicted on unconvicted prisoners while awaiting trial. In the Introduction to the Statistics for 1897 the Editor called attention to this point, and expressed the hope that the Bail Act of 1896 would effect an improvement; but unfortunately the figures are not very encouraging.

There were 10,902 prisoners for trial at Assizes and Quarter Sessions, and only 2,174, or less than one-fifth, of these were admitted to bail. This is no better than the figures for 1897 and 1898. Of the remaining 8,728 who were imprisoned before trial, no less than 1,541, between one-fifth and one-sixth, were detained for more than eight weeks, and 112 were actually detained more than sixteen weeks. When one considers what this long preliminary imprisonment means for a poor man, in impoverishing his family and crippling his defence, these figures will be seen to be very serious. No less than 1,257 of the prisoners detained before trial were ultimately acquitted; 234 of these were detained for more than eight weeks, and 19 for more than sixteen weeks. It is much to be regretted that the proportion of accused persons detained before trial still remains so high.

Another question of considerable interest, is whether the statistics reveal any marked change as a result of the working of the Criminal Evidence Act 1898. The policy of that Act has been hotly debated, and it has frequently been said that its effect will be detrimental to a prisoner's chance of acquittal, especially if he is guilty. But the figures for 1899 show no traces of any striking change. The proportion of convictions to prosecutions is 79 per cent. This is the same as that for 1898, and since 1889

the proportion has fluctuated between 77 and 79. The Editor of the Statistics for 1898 calls attention to the remarkable fact that for the part of 1898 up to 12th October (the date on which the Criminal Evidence Act came into force), the proportion of convictions is 80·3 per cent., while after the 12th October it falls to 78·5. There is therefore no reason, so far as the criminal statistics can show, to suppose that the Act is operating on any considerable scale to the disadvantage of accused persons.

V.—DRUNKENNESS AND CRIME.

(Continued from page 159.)

IN our last paper we investigated and summarised the law of England in relation to drunkenness as a ground of criminal irresponsibility. In the present article we shall examine the law of Rome and of various modern countries in relation to the same topic.

“In the Roman law,” says Austin,¹ “drunkenness was an exemption even in the case of a delict, provided the drunkenness itself was not the consequence of unlawful intention: if, for instance, I resolve to kill you, and drink in order to get pluck, according to the vulgar expression, the mischief, although committed in drunkenness, is ultimately imputable to my intention. In all other cases drunkenness was a ground of exemption in the Roman law.”

When we turn to the Digest we find but few passages directly bearing upon this subject. In the title—*De Pœnis*—(48, 19, 11, 2) a distinction is drawn between crimes according as they are deliberate, passionate, or accidental. “*Delinquitur autem aut proposito, aut impetu, aut casu. Proposito delinquent latrones, qui factionem habent; impetu autem cum per*

¹ Lect. XXVI.

ebrietatem ad manus aut ad ferrum venit." Again, in Di. 49, 16, "*de re militari*," we read (49, 16, 6, 7), "*Qui se vulneravit vel alias mortem sibi conscivit imperator Hadrianus rescripsit ut modus ejus rei statutus sit, ut si impatientia doloris, aut tædio vitæ (etc.) mori maluit, non animadvertatur in eum, sed ignominia mittatur; si nihil tale prætendat, capite puniatur. Per vinum aut lasciviam lapsis capitalis pœna remittenda est et militiæ mutatio irroganda.*" It is evident that this passage will not bear the burden which is generally put upon it. It relates to military crimes alone, and, as the context shows, to the single case of self-inflicted injury or attempted suicide.

There is a passage in the Code (9, 7, 1) better known, indeed, but scarcely more apposite. It is from a Constitution of Theodosius, Arcadius and Honorius, and refers exclusively to crimes of *lèse majesté*. It runs as follows: "*Si quis modestiæ nescius et pudoris ignarus improbo petulantique maledicto nomina nostra crediderit lacessenda, ac temulentia turbulentus obtreceptor temporum fuerit, eum pœna nolumus subjugari neque durum aliquid nec asperum sustinere, quoniam, si id ex levitate processit, contemnendum est, si ex insania, miseratione dignissimum, si ab injuria, remittendum.*"

Other passages are quoted from Cicero and Quintilian.¹ They speak with uncertain voice. The utmost that can be gathered from them is that the fact of drunkenness was sometimes ground of extenuation.

Upon the whole, therefore, Austin's conclusions must be said to be unsupported by evidence. The fact is that the Roman law contains no general provision on the relation of inebriation to criminal responsibility.

But though the Roman law, properly so called, is silent on this topic, Austin's dictum is substantially true of the mediæval systems of law derived from it. At the hands of the later Civilians the maxim, "*Per vinum lapsis pœna remittenda*

¹ Cicero de inv., 2, 5, 17. Auct. ad Herenn., 2, 16, 24. Quintilian, 5, 10, 34; 7, 2, 40.

est” received a wide extension, and drunkenness came to be recognised as a ground, if not of excuse, at least of mitigation. To this result they were aided by the Canonists, who, looking rather to the presumed state of the heart than to the external act, were inclined to indulge crimes committed under such circumstances of intoxication as excluded deliberate wickedness. At a still later epoch, the jurists of the 16th century elaborated a theory of criminal responsibility which has had great influence upon modern systems of law. “From the time of Clarus the opinion began to prevail, that the effect of the highest degree of drunkenness was indeed to exempt from the punishment of *dolus* (but that the offender was still liable to the punishment of *culpa*), except in two cases; namely, first when a person inebriated himself intentionally and with the consciousness that he might commit a crime while drunk; and secondly, when he became intoxicated without any fault on his part; as, for example, in consequence of inebriating substances having been mingled with his wine by his comrades. In the first of these cases the drunkenness was not allowed to be any ground of exculpation at all, while in the other it had the effect to relieve the offender even from the punishment of *culpa*. At this time, also, the different kinds of drunkenness began to be accurately distinguished from one another, and that only was permitted to have an influence, which deprived the subject of it of the use of reason.”¹

When we turn from the later Civil law to the systems of modern Europe we find, as usual, evidence of the secular antagonism between Roman and Germanic principles. It might be supposed that Themis had pronounced upon the lustiest of her children the imprecation of Dido upon the Trojans:

“*Littora littoribus contraria, fluctibus undas,
Imprecor, arma armis, pugnent ipsique nepotesque.*”

¹ *On the Effect of Drunkenness upon Criminal Responsibility.* Translated from the German of Prof. Mittermaier. Edinburgh, 1841.

The *Leges Barbarorum*, which deal in much detail with different cases of homicide, are significantly silent as regards crimes committed during intoxication. It can be safely assumed, therefore, that the English law herein represents the oldest usage of the Teutonic nations. An ecclesiastical parallel may be cited from the *Liber Pœnitentialis* of Theodorus, Archbishop of Canterbury, 668—690. (Thorpe (*Ancient Laws and Institutes*, p. 279).) "*Qui vero per æbrietatem hominem occiderit, pari culpa homicidium incurrit. Una est illi culpa quia per gulam semet necat, altera quia Christianum jugulat.*" This is precisely the doctrine of the Common law as laid down by Coke nine hundred years later.

Where Germanic principles prevail drunkenness excuses not, where Roman principles prevail drunkenness excuses. Such, in two sentences, is the history of the subject. The line of cleavage, however, between the two systems is not precisely that which a person superficially acquainted with legal history might suppose. Germany, until recently at any rate, confessed an allegiance to the Civil law. France and Scotland ranged themselves on the other side. To the first or Teutonic group, therefore, must be referred England, Scotland, the United States of America, the Scandinavian nations, and France; to the second or Roman group are assigned Germany, Austria, Belgium, Holland, and all the Latin countries other than France.

As might be expected, however, the line here indicated is not rigidly fixed. A severer attitude towards drunkards occasionally manifested itself in the legal systems of Germany or the Netherlands, without, however, exercising an abiding influence upon their development. Finally, it is to be observed that the criminal codes of modern Europe have naturally been influenced, as regards both their expression and their interpretation, by many motives other than national tradition. The above arrangement, therefore,

though historically just, does not necessarily reflect the divergences of modern practice.

Having premised thus much on the general tendency of the Roman and the Germanic law, we proceed to a particular examination of the principles actually in vogue in different countries at the present day.

Scotland, in spite of the invasions of Roman law, remains faithful to the opposing principle. Her law with regard to drunkenness, as an element in criminal responsibility, is substantially the same as our own.¹ As in England, again, modern decisions have shown an increased tenderness for the inebriate.

The United States of America reflect in detail the rules of the English law. Although the curative treatment of drunkards was practically attempted in America so long ago as 1846, yet drunkenness is still considered rather as a vice or crime than as a disease. As with us, voluntary intoxication does not excuse, unless it be attended by fixed or temporary insanity; but drunkenness is a material consideration for the jury, "whenever the actual existence of any particular purpose, motive or intent, is a necessary element to constitute a particular species or degree of crime" (*New York P.C.*, s. 17). This exception does not seem to be generally admitted in cases of homicide. But in the State of New York the law has been altered, so as to require deliberation as well as premeditation to constitute murder in the first degree, punishable by death, and it has been held that even voluntary intoxication, if so great as to render deliberation impossible, reduces the crime to murder in the second degree, which requires only an intent to kill.²

¹ Erskine, *Principles*, 18th ed., p. 545.

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² An epitome of the law relating to this subject, supplied by Mr. Clark Bell of the New York Bar, is to be found in Dr. Norman Kerr's *Inebriety*, 3rd ed., p. 584.

Sweden.—With respect to crimes, drunkenness cannot be alleged as an excuse, because it is the duty of everyone to abstain from such a vile and shameful state, which in itself constitutes a serious offence, and one can never excuse one crime with another, but must suffer for both. (Lind., *Judges' Discretion.*)

France.—The Penal Code (1810) which, by Art. 64, recognises dementia and “force majeure” as exculpatory has nothing whatever to say on the subject of intoxication, and therefore implicitly negatives it as ground of excuse. It appears, however, that in point of fact juries very frequently take it into account in answering the question “were there extenuating circumstances?” Drunkenness therefore, though not a legal excuse for crime, may in practice entail a diminution of punishment in accordance with the scale established in the Code.¹

In the Roman Dutch law “drunkenness being in itself an offence, is from its nature no sufficient ground of excuse. However, there may be cases in which the judge ought to take the circumstances into consideration, and (a) a distinction is properly drawn between the cases where a person has become drunk voluntarily and when he has become drunk against his will. (b) If he has become drunk through the seduction of others this may sometimes afford reasons for passing an exceptional (*i. e.* lighter) punishment. (c) But if the person who commits the offence has voluntarily drunk in order to be able to commit the crime with the more courage and firmness, then drunkenness, no matter how bad it is, can in no way serve as an excuse. On the contrary, the crime in that case is still more serious and punishable than if it were committed when sober. (d) If the drunkenness, though voluntarily brought about, has caused total insensibility, and there is no sign of a premeditated purpose to commit an offence, but on the contrary the person who

¹ From materials supplied by Mr. O. E. Bodington, Barrister-at-Law, of Paris.

committed the offence shows a sincere repentance, there may sometimes be reasons for mitigating the punishment. But in this case all depends upon the circumstances, which ought all to concur in favour of the person committing the offence, for, in general, the judge should not be ready to admit drunkenness as a good ground of defence." (Van der Linden, *Institutes of Holland*, A.D. 1806, Juta; Cape Town, 1897.)

Holland.—The Dutch Penal Code of 1886, s. 37, while mentioning mental infirmity or derangement as cause of exculpation, is silent on the subject of drunkenness. Previous to this date the French Penal Code was in force in Holland, and extenuating circumstances were sometimes admitted. This is no longer the case. "The matter is now an open question and left for decision to jurisprudence and practice. In practice drunkenness is generally not considered a ground of irresponsibility. Only in certain very exceptional cases it has been held (after an inquiry of experts) that responsibility ceases where drunkenness accounts for a total absence of knowledge and free will. Drunkenness is not a factor for alleviating or aggravating circumstances, and it is impossible to say what influence it bears upon the measure of punishment."¹

The Belgian Code of 1867 is equally silent on the subject of drunkenness as a ground of excuse, but the law gives effect to extenuating circumstances.

Germany.—In the Penal Code which came into force for the North German Confederation on 1st Jan. 1871, and was applied to the German Empire from 1st Jan. 1872, silence is preserved upon the subject of inebriation. The

¹ Communicated by Mr. W. R. Bisschop, LL.D. (Leiden) and Prof. Simons of Utrecht. Prof. Simons adds "According to my opinion responsibility will disappear in cases where intention is necessary in order to constitute a crime, as soon as knowledge and free will disappear. There can be no intention then. For the rest, this subject should be considered in connection with the difficult question of '*actiones liberae in causa*.'"

drunkard must justify under the same head as the madman or not at all.

Section 51 contains the following:—"An act is not a crime when, at the time of the commission of the act, the doer thereof was in such a condition of unconsciousness (*Bewusstlosigkeit*) or of mental derangement (*krankhafter Störung der Geistesthätigkeit*) as excluded a free expression of the Will."

Upon this section a commentator observes: "The expression 'mental derangement' includes, not merely mental derangement specifically so described, but also transitory mental derangement as that produced by intoxication."

Also the term "unconsciousness" will cover drunkenness, though not amounting to mental disease.¹

And it is immaterial that the drunkenness was voluntary.

But by the Military Penal Code, s. 49 (as previously by the Common law), voluntary drunkenness is no defence in cases of breach of military discipline.

It would seem, then, that the German Penal Code has parted company with the too precise distinctions of the later Roman law. The law as above stated appears to coincide with the less conservative decisions of the English Courts, and, as with us, to have been brought to this result rather by the process of judicial interpretation than by legislative prevision.

Austria.—The traditions of the Roman law here prevail. Generally stated the law is as follows:²—

- (1) Crimes committed in drunkenness admit of extenuating circumstances, and therefore . . . are punished less severely than if the doer of them had been sober.
- (2) If the drunkenness is complete and induces uncon-

¹ Liszt, *Lehrbuch des Deutschen Strafrechts*. Berlin, 1898, p. 163.

² Mainly communicated by Dr. Otto Vallentschag, Avocat, Laibach.

sciousness, responsibility is entirely excluded as regards any crime therein committed (Penal Code, s. 2c).

- (3) Unless the culprit have intentionally intoxicated himself, with the deliberate purpose of committing the crime which he then commits, in which case he is deemed guilty of the crime so committed.
- (4) But though the conditions contemplated in (2) be present, the drunkenness will, if voluntary, be punishable as an offence under ss. 236 and 523 of the Code, provided that an act has been committed, which but for the drunkenness, would be imputed as a crime. The punishment under the last-named section does not extend beyond three months, or six, when the drunkard was conscious of his infirmity.
- (5) Where the drunkenness is not complete, and an act is committed which bears all the external marks of a specific crime, then the crime is punishable as under ordinary conditions.

It will be seen from the above epitome of the provisions of the Austrian law that the drunkard is to a great extent recognised as irresponsible. The writer of this Article is informed by a legal correspondent in Austria that this tenderness of the law to drunkenness is so well understood, that brawlers are in the habit of getting drunk in order to have the benefit of extenuating circumstances. Against this evil may be set the case cited by Dr. Norman Kerr, of a person who killed his brother in a fit of drunkenness, and instead of being hanged lived to become an eminent temperance reformer.¹

Italy.—Here we find again that drunkenness to a

¹ Inebriety, p. 587.

considerable extent excuses. The Italian Penal Code distinguishes drunkenness as (a) accidental, (b) voluntary.

In the case of acts committed in a state of accidental or involuntary drunkenness, the law is the same as in the case of mental derangement. And therefore (1), if at the time of the commission of the offence the person committing the act was in such a condition of mental infirmity as to have no consciousness or no control over his actions, he is not punished at all; (2), if at such time the mental condition of the accused was such as to diminish greatly, but not entirely to exclude imputability, the punishment appropriate to the crime is diminished according to the degrees indicated in the Code (ss. 46—48).

In case of voluntary drunkenness, a further distinction is taken according as the drunkenness produces—

- (a) Complete unconsciousness, or
- (b) Partial unconsciousness.

In each case the punishment is diminished in greater or less degree, and in each case the diminution accorded to the habitual drunkard is less than that accorded to the casual drunkard (s. 48).

It would appear that the diminutions of punishment are in no case so considerable as to encourage the commission of crime; and it is further provided that no diminution of punishment is allowed if the drunkenness was procured to facilitate the execution of the crime or to furnish an excuse (s. 48).¹

Spain.—The Spanish Penal Code of 1870 reckons amongst extenuating circumstances (Art. 9) that of committing the act in a state of intoxication, when this was not habitual or posterior to the design of committing the crime.

“The tribunals shall resolve, in view of the circumstances

¹ Communicated by Dr. Vacchelli of Turin, and Sig. Avv. Proc. Silvio Clerici of Novara.

of the person and the act, when the intoxication must be considered habitual."¹

The Portuguese code contains a similar but more elaborate provision.

Russia.—For the following statement of the Russian law herein, the writer is indebted to an eminent professor in that country.² "In the general part of the Code in force, simple drunkenness, as also the circumstances which have influence upon the amount of punishment, are defined in Article 106; for a crime committed in a state of drunkenness, when it is shewn that the intoxicated person got himself into this condition especially with the intention of committing the crime, a greater amount of punishment is fixed than that which is (otherwise) laid down in the laws for the offence. But if on the other hand it is shewn that the delinquent had no such intention, then the amount of his punishment is defined according to the other circumstances of the crime.

The complete drunkenness, and the diseased inclination to it which lead to aberration and complete unconsciousness, bear witness to the absolute want of purpose of the doer according to Article 336. In a special part of the Code, drunkenness is considered in relation to the circumstances which diminish culpability in the case of crimes against religion, against the State, and against order. But even complete drunkenness does not exclude the conception of criminal responsibility, when it commits deeds forbidden by the law, or when it appears to be the cause of neglect of duty."

¹ When, however, complete unconsciousness supervenes, drunkenness is reckoned as mental derangement and excuses, not merely extenuates. (Liszt, *Droit Criminel des États Européens*, p. 164.)

² Professor Yesipov of the University of Moscow very kindly supplied an exhaustive statement of the law of Russia with regard to inebriation in all its aspects, from which the passage cited is extracted. Particular thanks are due to Professor Morfill of Oxford for procuring and translating this interesting document.

The above statement corresponds in the main with the account of the existing law to be found in the Commentary of the Commissioners upon their Draft Criminal Code.¹

This source supplies the further information that Russian law distinguishes between periodic drunkenness (*Zapoi*) and simple drunkenness. The first excludes responsibility, if accompanied by mental derangement. The second does not. The law does not distinguish between "complete" and "partial" drunkenness. The practice of the Courts is to deny to drunkenness any extenuating effect upon criminal responsibility.

Finland.—According to the Penal Code of 1889, chap. 3, section 4 (2), intoxication or any other like disorder of mind that the culprit has of his own accord brought upon himself may not be held as a cause for reduction of punishment.²

We have now, it is believed, passed in review all the provisions of ancient or modern systems of law, which are materially important to our enquiry. Before leaving the subject a summary may be attempted. The early English lawyers met the plea of the drunkard with a flat refusal. "As for a drunkard, who is *voluntarius dæmon*, he hath no privilege thereby; but what hurt or ill soever he doth his drunkenness doth aggravate it." The drunkard was a bad man—sad drunk, glad drunk, or mad drunk—it was all one. The dementia was *affectata*, and the offender must take the consequences of his folly or wickedness. This view had the merit of simplicity. It is too simple for the present generation.

Next, there is the theory of the Roman-Mediæval law and the systems which sprang from it. *Actus non facit reum, nisi mens sit rea*. When the mind is eclipsed by alcohol there is no *mens rea*, consequently no crime: hence the distinction between complete and partial intoxication.

¹ German translation, St. Petersburg, 1882, by Dr. X. Gretener.

² Communicated through Prof. Morfill by Prof. Lindelof of Helsingfors.

The first excludes *dolus* altogether, the second in less measure or not at all. But the complete drunkard shall not therefore escape. He had no business to get drunk. He will receive the reduced punishment of *culpa*.

Lastly, there are the modern codes, many of which reject the distinctions of the Civilians, and leave the courts to bring the drunken criminal under the scope of a general provision excluding responsibility in case of mental derangement or unconsciousness. This theory, like the first, is simple, perhaps a little too simple for the satisfaction and safety of sober men.

Richard Roe, in a fit of alcoholic mania, shoots John Styles dead, without lawful justification or excuse. The fit passes off as soon as the toxic effects of the alcohol are spent, and in forty-eight hours he is as sane as you or I. Plowden, Coke, Hale, Hawkins, Holroyd and Manisty would hang him. Stephen would send him to an asylum for lunatics. The latter course would be adopted by every modern system of law (the English law included). But the man is sane, not mad, and what is afterwards to become of him is a matter fit for consideration. Sober men must be protected from him. He must be shut up—if not in a madhouse then somewhere else—and sober men will have to pay for his detention. If there is nowhere else to keep him, he must be herded with lunatics, or let loose for fresh aggressions upon society.

Richard Roe, being drunk, shoots John Styles as before. He was not mad, but too drunk to know what he was about. Mr. Justice Day would acquit him, and leave society to take its chance. In France he would run the gauntlet of the jury. In the Roman-Dutch law he would have the benefit of extenuating circumstances. In Austria he would get off with an almost nominal punishment. In Italy he would be punished according to the measure of the crime; but not so severely as if he had been sober. In Germany his

unconsciousness will save him from the punishment of criminals. In the law of England, of Scotland, of the United States, of Russia, he would still, it is believed, suffer the penalty of his crime. *Qui inscienter peccat, scienter emendat.*

In Spain he would have the benefit of extenuating circumstances if his drunkenness were not habitual. In Italy the habit of intoxication would enhance his punishment, but not to the full measure of the sober man. In Russia the dipsomaniac might be treated as a madman.

Richard Roe shoots John Styles as before, being drunk, but not so drunk as not to know what he is about. The law of England, of Scotland, of the United States of America, of France, of Germany, of Holland, of Russia, ignores his drunkenness as immaterial. The law of Austria and the Roman-Dutch law apparently do the same. In Italy he will have the benefit of extenuating circumstances—less if he is an habitual drunkard, more if he is not. In Spain his drunkenness will stand him in good stead only if it be not habitual, and if the crime were both conceived and executed under its influence.

R. W. LEE.

VI.—VIEWS ON THE RELATIONS BETWEEN ENGLAND AND AMERICA.

RECENT events have made the relations between Great Britain and the American people of profound interest; of interest not only to the two peoples directly involved, but to every people of the globe. The effect of these relations and their consequent interest extends equally to barbaric disorganized tribes and to civilized powers. It may be profitable, in this connection to revert to the American visit of the late Lord Russell of Killowen and to the effect of his address before the American Bar Association.

It is undoubtedly true that until the last decade a vast majority of the people of the Republic looked upon Great Britain as an hereditary, national, natural enemy. This sentiment had been increased by the fact that some Americans—those who should have been most familiar with English customs—had become hybrid caricatures, unintentionally imitating the English valet, and believing themselves to be prototypes of the English gentleman. A portion of our people were occasionally possessed either of Anglo-phobia or Anglo-mania.

But for some years prior to 1896, the date of Lord Russell's visit, the great body of our people had gradually begun to acquire a broader and better knowledge of the Englishman as a man and of the English system of government, including a growing conception of its tremendous power, and a realization that we are ourselves sharers in many centuries of British glory.

Co-incident with this visit the Venezuelan question had produced a tension and a strain; but great national changes, like chemical reactions, are usually accompanied by a development of heat and at times by violent explosions. Relations, as well as chemicals, before crystallization are usually superheated. A condition of intense nervous excitement, involving the possibility of serious enmity, may result in warm friendship. We were at that time in a tense and highly strung condition, making us ready to fly into the arms of Great Britain or into arms against her. The country, therefore, was ripe for some determining influence, when in that year Lord Russell visited us.

He addressed five hundred of the leading members of the American Bar at the annual meeting of their Association. His hearers carried to their homes the impressions then formed. The American lawyer does not influence public opinion hurriedly and noisily. His influence, however, is enormous; and usually, sooner or later, that influence

prevails and at last permeates and affects the entire people.

What was the impression made by Lord Russell on the American Bar and through them upon the people? What manner of man did they meet in this Chief Justice from across the sea?

They saw a calm, strong face, a bearing, a diction, an intonation in no wise suggesting a different race or nation from themselves. He might have been a distinguished American judge or a great leader of the American Bar for all that his governmental views, his words, his appearance or his bearing showed. They heard a deep and powerful plea for peace, fellowship and friendship. They realized that the speaker was a true lover of liberty; that the nation producing him must deal justly with all its peoples, even though they were brought beneath its banners by the conquests of its arms; and underlying it all they recognised that sterling manliness of national character, the real basis of the English character; they saw a willingness to endure much to maintain peace, but with it an unalterable resolution fearlessly to face all foes and all dangers, a readiness to meet national destruction itself rather than national dishonour. "But further, friend as I am of peace, I would yet affirm that there may be even greater calamities than war—the dishonour of a nation, the triumph of an unrighteous cause, the perpetuation of hopeless and debasing tyranny."

The American people have at last realized that they are of one blood with the mother country, that the two nations, the two great liberty-giving powers of the world, are natural and necessary allies. We know that England's colonies are governed well, and by impartial observation have come to understand that the principle of liberty and local self-government is possessed in the fullest possible degree by all her subjects. Of course, it is true that the capacity to rightly enjoy liberty is gained only by centuries of national

and individual development ; but it is apparent to impartial students (this our people have been for some years) that to each subject and to each people, Great Britain gives as absolute liberty as is consistent with the condition of that individual and that people, endeavouring at the same time to develop in all as rapidly as possible the capacity for government ; to do more than this converts liberty into licence, and suggests a French Revolution rather than Anglo-Saxon development.

The careful student of recent affairs will attribute to Lord Russell, more than to any other individual, the development of this good feeling between the two powers. When, shortly after his visit, Great Britain by her bold and friendly course probably prevented the intervention of other Powers in the Spanish-American war, the bond of union was sealed. It is true that there is in the United States an element of some size which seeks every opportunity to express its desire to "twist the lion's tail." This element, however, belongs to that class whose noise and whose influence are inverse in proportion. It should also be borne in mind that men frequently say more than they mean, and make many threats which they will never carry out. Free speech is a great safety valve. Under political irritation and excitement public speakers often go beyond their real sober judgment. As the Republican party, now in power, is admittedly friendly to Great Britain, Democratic leaders (and the writer is a lifelong Democrat) very naturally in attacking the policy of their political opponents sometimes attack Great Britain. These attacks do not represent the policy of the Democratic party, which is really as friendly in its feeling towards Great Britain as is the Republican party.

When a few years ago Great Britain found herself facing a serious issue in South Africa, the American Government and the American people were prepared calmly to study the causes of the conflict, and to realize fully that England was

right in her contention and that she was forced into the war. The South African Republic appealed romantically to the chivalry of the world ; but a close analysis showed the appeal to be as much opposed to truth and common sense as the Boer himself is opposed to civilized warfare. We saw that the Boer, while nominally a liberty lover, is in truth really unalterably opposed to a free government and to a free people. We realized that so far as real civilization is concerned he was as far behind the Englishman of to-day, as the North American savage was behind the first settlers of America. We stood shoulder to shoulder in sustaining the British position, and I believe it safe to say that to have changed our moral acquiescence to armed support it was only necessary for some outside Power to attempt interference.

Many had believed that the British Empire was loosely joined together, ready to fall apart with the first blow from within or from without. What, then, did they think when it became apparent that every remotest part of the Empire was inflamed with the desire to hurry troops to the front, each colonial considering it his war as absolutely as did the Englishman at home ? Many Americans, prior to this time, intelligent people, believed that down-trodden Canada waited only for an opportunity to throw off the hateful British yoke and join us. We knew we had the best government in the world and thought the Canadians agreed with us. We saw when the issue came, that the Canadians were as devotedly loyal to their country as we to ours. As the war developed, and as the British soldier grew stronger and braver after each apparent defeat, and as national patriotism grew greater each day, it showed as nothing had ever done before, the cohesive power of the most distant parts of the Empire, and none rejoiced in it more than did the kindred race across the sea, the citizens of the American Republic.

Our awakened interest in and increased knowledge of the mission and greatness of the British Empire have deepened

our appreciation of the fitness of our own government for its present and its future, have stimulated our patriotism, and deepened our wholesome Anglo-Saxon contempt for the American who falters in loyalty to his own institutions. But we admire the same loyalty in others, and look with pride of race on British glory, and the strength of the British Empire. In the awakened friendliness of our own relations with that great Empire, we see a practical alliance for the advancement of civilization, an alliance against which nothing in the whole world can prevail.

BURTON SMITH.

VII.—THE REFORM OF THE LICENSING LAWS.

DURING the years 1830 to 1869 the experiment of Free Licensing for Beer was tried in England. Following the recommendations of the Committee of 1830, an Act was passed authorising *any person*, being an householder assessed to the poor rates, to obtain a licence from the Excise to sell beer by retail on payment of two guineas a year. The objects of the Committee in making the recommendations, and of Parliament in placing them upon the Statute Book, were twofold. In the first place it was desired to break the brewers' monopoly by allowing free trade in beer; and in the second place to promote the consumption of beer in preference to spirits.

The immediate result was that 30,000 beer-houses sprang into existence, and that number had increased to 50,000 by the year 1869. The experiment is characterised by temperance advocates, generally, as a gigantic failure, but it was allowed to continue in force for 39 years; and in 1853 Mr. Villiers' Committee, while advocating the abolition of the Beer-house system, and the establishment of one uniform licence, nevertheless recommended that "it

should be open to all persons of good character to obtain such licence, on compliance with certain conditions and the payment of a certain annual sum."

The real rock upon which the scheme was shipwrecked was that no qualification, or only a very slight one, was necessary in respect of the house. No matter how difficult it was to effect police supervision, no matter how unsuitable the premises might be for the purpose of the trade, there was no power to refuse the licence on either of those grounds.

The result was, that the publican's business was often carried on in premises totally unsuitable for the purpose, while in many of the poorer districts of the towns the number became excessive and the congestion great, and to no small degree this state of affairs exists at the present time. To take only one example (which might be multiplied almost indefinitely): the proportion of public-houses to population in Sheffield is one to every 40 families, or about one to every 192 persons, while in one district of the town there are 35 public-houses within a radius of 210 yards.

Such a condition of things is largely the result of there having been no value qualifications under the former system of Free Licensing; but the present system has given rise to an evil of a different kind, namely, the high value of licences in all places where excessive congestion does not exist, or in other words, the great difference between the value of licensed premises and the value of the same premises without a licence. The result is that licences are often worth say from £5,000 to £20,000. The competition for them is enormous, and new licences, when granted, usually mean a present of the value of several thousands of pounds to the fortunate recipient, for which no *quid pro quo* is exacted; while the police and the magistrates know that, if the renewal of a licence is refused for misconduct or any other reason, a heavy pecuniary loss will be inflicted, and it will

in all probability fall on the innocent shareholders in some brewery company. Such a feeling cannot but tend to produce laxity in the administration of the penal provisions of the Licensing laws.

It is not always borne in mind that in proposing any scheme of Licensing Reform a distinction must always be made between town and country districts. It may be said that in "Rural England" no radical reform of the present system is needed. At any rate, there is no evidence of any considerable feeling of discontent with the existing conditions.

Shortly, then, the scheme of Free Licensing that is here proposed is somewhat after this manner: Firstly, there should be but one public-house licence, all distinction between beer-houses and public-houses being done away with. Secondly, in all boroughs, urban districts, and "populous places" (using the expression in the technical sense), any person should be able to obtain this licence subject only to three restrictions: (a) That the applicant was of good character; (b) That the premises were of a certain rateable value; and (c) That the premises were in every way structurally fit for the carrying on of the trade. Thirdly, that after the expiration of a reasonable period (seven years is suggested), every holder of an existing licence who did not comply with these conditions should not be entitled to have his licence renewed, so that every public-house licence throughout the country should be granted and maintained on a single uniform principle.

This last proposal might be combined with a scheme of compensation for the licence-holders who lose their licences purely through failure to comply with the conditions, and not as a result of conviction or misconduct. The funds necessary for payment of compensation could be raised from the trade; and the tax would not be a heavy one, because only the most unnecessary and least valuable

licences would be so allowed to lapse. If this compensation fund were put in force, it would render it possible to make every licence-holder comply with the conditions at once instead of at the end of seven years.

Referring again to the conditions: the first one is obviously necessary and needs no advocacy. The minimum rateable value is taken as an easy way of insuring that the premises should be really fit for trade purposes, and not mere cottages or hovels converted into drinking dens. Probably a rateable value of £100 would not be an excessive figure to adopt as a minimum. The third condition is a corollary to the second, to make assurance doubly sure. With a high minimum rateable value and an absolute power of refusal for structural imperfections, there is little doubt that the licensed premises would always be adapted to their purpose.

The advantages that such a scheme would offer are several.

(1) It would in the first place effect a very large reduction in the number of licensed premises, and the licences that would be got rid of would be precisely those that cause most trouble in the administration of the law. The large premises where the publican must sink a considerable amount of capital in his business are usually well managed, because it is to his interest that they should be so. The trouble arises from the small, congested, ill-ventilated, badly constructed houses that need next to no capital to start and maintain, and that offer the greatest difficulty to proper police supervision.

(2) There would be an enormous reduction in the value of the licence as such. As everyone who could comply with the conditions could obtain a licence, there must cease to be any striking difference between the value of licensed and unlicensed premises. The benefits of this would be, that the trade would cease largely to be a monopoly, and the penal provisions of the Licensing laws could be enforced

without inflicting large pecuniary losses on innocent people. The knowledge of this could not fail to materially assist the police and the magistrates in the administration of the law.

(3) Another consequence would be the diminution in the profits of shebeening. In fact the game would no longer be worth the candle.

(4) Finally, the scheme here outlined would fit in with any proposed reconstitution of the licensing authority, such as the one proposed in the majority report of the recent Licensing Commission.

To conclude—the writer does not hope that such a scheme will work wonders in promoting the cause of temperance: there is no satisfactory evidence to show that the amount of drunkenness depends upon the number of public-houses; but it is confidently predicted that it would mitigate several evils of great magnitude to which the present state of the Licensing laws has given rise.

H. J. RANDALL, JUNR.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

France and Siam.

ATTENTION has recently been called to the unsatisfactory relations existing between France and Siam under the treaty and convention of 1893. The friendly relations between the two countries which had existed since 1856, underwent a change when France, after assuming a protectorate over Annam (1874 and 1884) and Cambodia (1863 and 1884), began to assert claims on their behalf to territory up to that time treated and occupied as Siamese; and the unfortunate resistance offered by the Siamese to the passage of French ships of war up the river to Bangkok,

following on a rupture of diplomatic relations, gave an opportunity for enforcing those claims which Siam could not resist. The treaty contains a recognition by Siam of all the rights of the empire of Annam and the kingdom of Cambodia on the left bank of the Mekong river and its islets, and a renunciation of all pretension to that territory; and Siam also undertook to evacuate that bank forthwith, to keep no troops or fortified posts on the right bank within a radius of 25 kilomètres from the river or in the provinces adjacent, to place at the disposal of the French Government all Annamites, French subjects or Cambodians, so as to allow their return to the left bank of the river, and to grant coaling stations and wood-storing places to the French Government in order to facilitate the navigation of the river. As a guarantee for the evacuation of the left bank, the port and river of Chantabun were handed over to the occupation of France, in whose hands they still remain.

Our own interest in this matter lies in the fact that in 1896 the British and French Governments entered into a convention, providing that neither Power should advance its armed forces into the region comprised in the basin of the Menam river and its tributaries, and the plane of territory lying to the North of it (that is roughly the whole centre of Siam), or acquire any special privilege there in which the other should not share. It was also stipulated that the commercial advantages granted by China to these Powers by the treaties of 1894 and 1895 respectively, relating to the adjoining Chinese territories, should be mutually available to both; and Lord Salisbury and Baron de Courcel placed on record their views that the declaration would "testify particularly to the joint solicitude of their Governments for the security and stability of the kingdom of Siam." This agreement does not secure the integrity of Siam up to the boundary fixed by the Franco-Siamese treaty of 1893;

but it contemplates the continuance of the *status quo* there, by its reference to the special provisions regarding the neutral zone above mentioned and the navigation of the Mekong. The circumstances of the case seem to make it a very proper subject for submission to the Hague Arbitration Tribunal, on which both parties have representatives.

The Chinese Problem.

The Anglo-Japanese Treaty of January 30, 1902, although its objects as expressed are similar to those of the Anglo-German agreement of 1900, has the advantage over the latter, from a practical point of view, of possessing a direct sanction for enforcing its provisions. The prior agreement, which as an enunciation of the principles to be applied to the Chinese problem received the adhesion of all the States interested in the Far East, has had little visible effect on the international situation, because its only sanction was the vague reservation to the signatories, in the event of any other State interfering with the application of those principles, of the right to take such steps as should be necessary to preserve their own interests; and the declaration of the German Government that the agreement did not extend to Manchuria seemed to rule out of its scope the only case in which its application was likely to be seriously required. The present agreement supplements its definition of principles of policy, namely, the independence and territorial integrity of China and Corea, with the declaration that these principles constitute a "special interest" of the signatory governments, which each may safeguard if threatened either by the aggressive action of any other Power, or by disturbances arising in China or Corea, and necessitating the intervention of either signatory for the protection of the lives and property of their subjects; and that if either signatory in defence of its respective interests shall become involved in war with

any other Power, the other party will observe strict neutrality and endeavour to prevent any other Power from joining in hostilities against its ally, and in that event will come to its assistance.

Lord Lansdowne's interpretation of this provision is, that "it renders either signatory liable to be called upon by the other for assistance only when one of the Allies has found itself obliged to go to war in defence of interests which are common to both, when the circumstances of its doing so are such as to establish that the quarrel has not been of his own seeking, and when engaged in his own defence he finds himself threatened not by a single Power but by a hostile coalition." But it must be noticed that the treaty does not recognise that these interests are identical as regards China or Corea, but speaks of Japan as being "interested in a peculiar degree politically as well as commercially and industrially in Corea as well as in China;" and although it provides that both parties shall fully and frankly communicate with each other if either thinks that these interests are in jeopardy, and shall not make any arrangement with a third party prejudicial to it, this does not preclude either party from deciding for itself whether its special interest is threatened or not, nor, if it becomes involved in war owing to its vindication of its peculiar interest, from calling on its ally for assistance.

The authors of the Treaty may however take credit for the clearing of the international position in China which may fairly be ascribed to it. Russia and France have issued a joint Note declaring that the essential principles of the Treaty are, and have been, the basis of their own policy and a guarantee for their special interests in the Far East, with a reservation of "the right to consider eventually the means of ensuring the defence of their own interests if

threatened by the aggressive action of third parties, or fresh troubles in China raising again the question of the integrity and free development of that Power." A further and perhaps more important result of the Anglo-Japanese joint action is to be found in the announcement of a Russo-Chinese agreement, fixing a date for the evacuation of Manchuria, and providing for the restoration of Niuchwang to the Chinese on the restoration to them of Tientsin City by the other Powers.

South Africa.

The course of recent hostilities in South Africa has shown that they must still be considered as regular warfare; and in the case of the forcible incorporation of one State into another, it is only just that the status of belligerents should be accorded, so long as actual circumstances admit of it, to the organised forces of the former State which is fighting for separate existence; and it must be remembered that our own Government at the Hague Conference strenuously upheld the right of the levy *en masse* or general population of an invaded State, not occupied, to be treated as belligerents. The severe measures which have been taken in modern wars against irregular forces of the enemy whose country is temporarily occupied, or in civil war against rebel forces prolonging a hopeless resistance, do not furnish apt analogies for a war of complete conquest and annexation; and such acts as the forced sale or confiscation of the lands of enemies still in the field, and the threatened banishment of leaders in the like case, are open to the criticism that they are attempts to apply to persons who are still combatants, conducting organised operations according to the laws of war, treatment which is properly applicable to rebellious subjects. Strictly, "until a title indicating permanent possession has been superadded to the temporary title of the sword, no

valid alienation of immoveable property can be made by the conqueror, and the state of conquest must first be changed to one of established government and submission of the conquered people to the new government, evidenced by the tranquility of the people, their obedience to the laws, and above all by the quiet and regular administration of justice in proper *civil* tribunals. The conquest which is to be the foundation of empire must not be the mere conquest of a capital (*victoria particularis*) but of a country (*universalis*).” (Phillimore, iii, 691.) For the same reason, so long as the hostile forces can be considered national forces, the status of their surrendered countrymen employed in arms against them is a doubtful one.

The reported objection made by the French government to the treatment as prisoners of war of certain French subjects, who had previously taken part in hostilities but afterwards as non-combatants took the oath to live peaceably, on the ground that they were not taken with arms in their hands, does not seem to be a valid one either by past international practice or by the present rules of war. In the Franco-German war the right to detain merchant seamen taken in the enemy's ships, on the ground that they are ready-made material for combatant purposes, was upheld by the French government against the contrary German contention; and it must always be a question for military determination whether a combatant, who has ceased to be such for the moment, is not likely to resume that character. The most extreme instance of detaining non-combatants was probably the confinement by Napoleon of all English persons found in France in 1807, but this was held even by the opinion of the time to exceed the measure of belligerent rights.

A painful feature of the later hostilities, however proper or necessary, but which fortunately has been rare;

has been the trial, and in some cases execution, of military leaders of the hostile forces, on the charge of causing or allowing persons who have surrendered or been captured by them, especially natives, to be put to death. The British military authorities have shown that they make no difference in their punishment of such offences, when the authors have been British soldiers. In the case of such offenders who are in the position of deserters or rebels, this right of their government is an undoubted one: and where such offences have been committed by persons who have never owned British allegiance, such punishment is justified by the strict laws of war on the principle of retaliation. In this latter case, however, the right should be exercised with great caution, and not before the possibility of the alleged offences having any justification by the laws of war (*e. g.*, execution of spies) has been excluded by evidence which would be regarded by the ordinary civil courts of the land as satisfactory for that purpose. The fact that the victims of these offences have generally belonged to the native races, while affording no legal or moral grounds for different considerations being applicable to them from those which would apply to the case of white men, makes it all the more necessary that thorough investigation should be made into the part played by the victims in the military operations. The difficulties which arose from the employment of the Indians in the American war of Independence, and Lord Chatham's denunciation of it, may be recalled in this connection.

The fact that the British military authorities have allowed the members of the provisional Transvaal Boer Government to consult with the officials and military commanders of the former Boer States still in the field, as to terms of submission, does not imply any recognition of them as representatives of an existing State organization: but at the risk of this construction, there are obvious advantages in dealing

directly with any body of men, recognized by the hostile forces in the field as having Executive authority over them, as their proper representatives for this purpose, to the only alternative and tedious method of arranging terms with each separate unit of the military forces by military surrender.

Responsibility of a State for Acts of its Citizens.

It seems to have been suggested that the abduction of Miss Stone, the American missionary, by brigands in Turkey, and her ransom from them paid by the American Government, were grounds for claiming pecuniary compensation from the Turkish Government, and it has been pointed out, in support of the Porte's disclaimer of any responsibility in the matter, that the lady had received warning from the authorities of the danger of travelling through a wild district without any escort; that the captors left her north of the Turco-Bulgarian frontier; and that no government has admitted its liability for ransom paid to criminals; *e. g.*, Italy for similar detentions in Calabria, Tuscany and Sicily, Russia in the Caucasus, and the United States for kidnappings or robberies on the trans-continental railway lines between New York and San Francisco. The assumption that the capture and detention took place on Turkish soil and by Turkish subjects does not decide the question. While it must be admitted that a State must in a general sense provide itself with the means of fulfilling its international obligations, it is also true that a government cannot be required to provide itself with the most efficient means possible for that purpose, nor is it bound to alter its form of administration in order to give absolute protection to the interests of foreign States. (Hall, p. 230.) A State seems to fulfil that duty as regards foreigners if they are not placed at any disadvantage with native subjects, and if they are given notice of any special circumstances which render it

inadvisable to visit any particular parts of its territory. After such warning they go at their own risk. A State is no more bound to make good losses or damage caused to life or property of foreigners within its territory by isolated acts of individuals (unless such as it is well within its competence to suppress and punish), than it is for losses caused by civil commotions, insurrections, or foreign war and invasion; but such foreigners are confined to the remedies available by the municipal law of the country. The act of an individual citizen, or small number of citizens, is not to be imputed without special proof to the nation or government of which they are members (Phillimore, I, ccxviii): and allowance must also be made in this case for the special circumstances of the Turkish administration. It has been pointed out by Hall (p. 231) that this question of State responsibility has not been adequately discussed by jurists; and the tendency of present opinion is to enlarge the scope of the principle. This is especially noticeable in the case of neutrality; and discussion has recently taken place as to the advisability of all nations recognising their responsibility in this case, by uniform municipal legislation on the lines of that existing in the United States and Great Britain, which would fill a gap in the present system of international obligations.

Recent Cases.

In *In re Fergusson's Trusts* (L. J. N., Feb. 8th, p. 79) a domiciled Englishman resident in India left a legacy to a niece, a domiciled German lady, and "her next of kin." By German law, relations by the whole blood take priority of those by the half blood. It was held in accordance with the ordinary rule that English law, as the law of the domicile of the testator, governed the construction of the Will, and the half blood took equally with the whole.

In *In re Bozzelli's Settlement* (1902, W. N. 51) a domiciled

Englishwoman had married an Italian subject domiciled in Italy, and after his death, while still having an Italian domicile, she married his brother—a valid marriage according to Italian law. The Court decided that this marriage was valid in England, in spite of the statute of William IV declaring marriages within the prohibited degrees of affinity “null and void for all purposes,” following the view which has the balance of judicial authority in our law that the statute only applies to persons domiciled in England, whether subjects or aliens (Dicey, p. 645).

The case of *In re Selot's Trusts* (1902, W. N. 11) raised the question of the recognition of a status declared by the law of the domicile in another country, the facts being that a domiciled French subject had been pronounced a prodigal in France, and a *conseil judiciaire* had been appointed for him by a French Court, and he claimed a sum of money bequeathed to him which the executors of the will had paid into Court here. It was decided, following *Worms v. De Valdor* decided in 1880, that if a change of status had taken place by French law it was one which was not recognised by our law, and an argument that an analogous status (incapacity by insanity to manage affairs) had been created by the Lunacy Act 1890 (s. 116) was rejected. The French Courts, however, have recognised and given the same effect to a foreign judgment dealing with the status of a foreigner as it would have by the law under which it was given (Piggott, *Foreign Judgments*, p. 453).

The High Court has also declared itself competent to exercise jurisdiction over a foreign corporation carrying on business temporarily within the jurisdiction (*Dunlop Co. v. Actien Gesellschaft* [1902], 1 K. B. 342): and to order an inquiry into the alleged lunacy of a domiciled American lady temporarily in England, whose property was chiefly real

property in the United States, and whose only property here consisted of a few chattels she had brought with her (*Burbridge's Case* [1902], W. N. 41). This latter point was already covered by similar decisions in the case of a person found lunatic in Jamaica where her property was situate, and temporarily in England (*In re Houstoun* [1826], 1 Russ. 312); and in another case where a Portuguese gentleman domiciled in Portugal besides having almost his entire property there and his wife and child living there, became lunatic in England, and the Portuguese Court requested the English Court to inquire into the state of his mind (*In re Sottomayor*, L. R., 9 Ch. 677). Our Divorce Court has also recently decided that it possesses jurisdiction to pronounce a decree of nullity of marriage celebrated in England between British subjects not domiciled here, where the husband had been previously married in the Isle of Man and his first wife was still alive (*Brennan v. Brennan*); and it has thus added another link to the chain of matrimonial jurisdiction which it has established its right to exercise, as successor of the Ecclesiastical Court, over persons locally present within the sphere of its authority, in petitions for aliment, protection, restitution of conjugal rights and judicial separation. Dicey states the foundation of jurisdiction in this case to be the mere fact of the marriage having taken place in England (p. 277) and a decision in 1894 (*Linke v. Van Aerde*, 10 T. L. R. 426) supports this; but Westlake's view (p. 82) is that real residence is required for this purpose.

Another case, *In re Barnett's Trusts* (18 T. L. R. 454), is interesting as raising a question between two governments as to which should succeed beneficially to moveable property situate in the one country (England), but belonging to a domiciled subject of the other (Austria), dying without heirs or next of kin, the property by the law of either

country accruing beneficially to the government as *bona vacantia* or a *caduc* respectively. The decision was in favour of the British Crown which had taken out administration, on the ground that the principle *mobilia sequuntur personam* only governs distribution of moveables, and there was in this case nothing to distribute, the Crown through its prerogative taking by confiscation and not by succession. It is undisputed in our law that succession to personal property situate in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased at the time of his death. In the case of *Lynch v. Government of Paraguay* (L. R., 2 P. & D. 268), an issue was raised between the government of Paraguay and the heirs of a person domiciled there, with regard to the succession to personalty in England, the government having passed a law after his death confiscating all his property; the heirs succeeded on the ground that they were entitled by the law of Paraguay as it stood at the date of the death; and from the reasoning of the case it would seem that if the confiscation had taken place before the death, the government's right to succeed would have been upheld. In principle it should make no difference that the heirs designated by the law of the country of the domicile is the State instead of a private person; and our law recognises the mutual limits of its own jurisdiction and that of foreign law, with regard to successions, by imposing no legacy or succession duty on moveable property, though situate in England, belonging to a person domiciled abroad, on the ground that the succession does not take effect by English law. The judgment seems to proceed partly, too, on the principle that the administration of a person's moveables is governed by the law of the country where the administration acts, and that administration in this case exhausted the fund so that there was no distributable residue. No doubt priority in administration, *i. e.*, in payment of debts, is

governed by the *lex fori* or *lex concursus creditorum* without reference to the *lex domicilii*, according to the better view in our law. In cases of intestacy of English subjects without heirs, the Crown, or a possessor of the Crown's prerogative rights, such as the Duchy of Cornwall, have the right to administer for their own benefit; and the Crown has successfully resisted a petition by a foreign consul to administer the effects of a domiciled countryman dying in England, though only limited to the purpose of paying his debts and transmitting the balance to his national treasury (*Goods of Wyckoff*, 3 Sw. & Tr. 20). But administration is *per se* quite distinct from beneficial succession; and unless the beneficial right to the residue can be regarded as a debt due to the Crown (like probate or estate duty), or it can be said that such a succession by the foreign law is in the nature of a penalty which our Courts will not enforce, or is repugnant to the policy of our law from the point of view of international comity, there is good reason for making unclaimed residue, which is certainly in form and effect a succession, accrue to the benefit of a person designated by the law of the domicile, whether that be the State or a private person, and whether the administrator be the Crown or not.

An instance of jurisdiction by contract (a short way of solving the difficulties relative to *compétence* in this connection), as the basis of a foreign judgment, is afforded by the case of *Feyerick and others v. Hubbard* (L. J. N., March 8th, p. 138). By a contract made in Belgium by a British subject with a Belgian firm to assign certain patent rights, it was agreed to submit all disputes to the Belgian Courts; action was brought there for a breach, and after all the formalities of Belgian law had been fulfilled, in default of appearance final judgment was given by the Belgian Court: and the English Court held this judgment binding by the agreement

although the defendant was not a Belgian subject nor served within Belgian jurisdiction. *Taylor v. Hellard* (L. J. N., Feb. 8th, p. 81) is an example of a foreign judgment being valid as a *res judicata* here. The plaintiff had recovered judgment in England in 1884 against a Transvaal subject then in England: in 1886 he had sued the defendant, then being in the Transvaal, in the Courts there, on the English judgment, and obtained judgment for part of the sum, but proceedings in order to enforce the judgment were annulled on a friend of the defendant paying its amount, and the defendant undertaking to be responsible for the further liabilities. In 1900 the plaintiff again sued in England for the balance; but the Court has now held that the payment under the Transvaal judgment not being made by the defendant, or voluntarily, did not operate to prevent the English statutory time of limitation of actions barring the present suit, and that the Transvaal judgment was a bar to any further proceedings here or elsewhere. These cases illustrate the advantage to be gained by an uniform simple system of enforcement and recognition of foreign judgments.

G. G. PHILLIMORE.

IX.—NOTES ON RECENT CASES (ENGLISH).

IN his most learned and entertaining judgment in *Van Grutten v. Foxwell* (L. R. [1897], A. C. 658, at p. 667), Lord Macnaghten says that the rule in *Shelley's Case* (1 Rep. 93 b) "rarely comes up for discussion now-a-days." When this remark was made it was perfectly just, but since then the veteran rule has come out of its long retirement and by repeated appearances in the Courts, has shown lawyers and the world generally that it is in as good form as ever. Its latest display has been in *Pelham Clinton v. Duke*

of *Newcastle* (L. R. [1902], 1 Ch. 34). There the Court of Appeal (affirming the decision of Buckley, J.) held that a devise to "Charles, if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which," then over, conferred upon Charles, an estate in special tail male. No doubt the effect of this decision was, that the devisee could immediately on the will coming into operation bar the entail and marry a "fit and worthy gentlewoman" or not as he liked, and still preserve the estate to himself and his descendants. This might, no doubt, as Vaughan Williams, L.J., points out, frustrate the real object of the testator, which was to cut out of his inheritance a son of whose conduct he did not approve. But again, as Lord Macnaghten says in *Van Grutten v. Foxwell* (*supra*, at p. 669), the very end and purpose of the rule is to disappoint intention. That, at any rate, has been its effect in modern times; but it may be doubted whether it was not originally devised to carry out the intentions of the grantor at a time when contingent remainders were not recognised, and a grant of a remainder (following a life estate) to the life tenant's heir would have been void as a limitation to an unascertained person.

* * * *

It is said that recently a very distinguished Irish member of the Bench declared, in an after-dinner speech, that in the future, one of Lord Macnaghten's greatest claims to remembrance would be, that he was the only person in the whole history of English law who contrived to make an exposition of the Rule in Shelley's Case a delightful specimen of light literature.

What is an equity of redemption? Buckley, J., says that it is an equitable right to redeem which arises only after the legal right to redeem given expressly in a mortgage has expired (*Lisle v. Reeve*, L. R. [1902], 1 Ch. 53, at p. 67).

The Court of Appeal dissents from this definition, or at any rate from the practical consequences of it (*Ibid.* at p. 72 and p. 75). Logically and historically, the view of Buckley, J., seems to be right. But when he based upon it the conclusion that the doctrine forbidding the "clogging" of the equity of redemption had no application to the legal right of redemption, he apparently forgot that equity regards a mortgage from its inception as merely a security for the mortgage debt, and will not permit any covenant or condition in the mortgage to be enforced, if it give the lender more than the money lent and the interest reserved in it, *e. g.*, a covenant for the payment of a higher rate of interest on failure to pay punctually the interest reserved.

The position of special and general executors, under sect. 30 of the Conveyancing Act, 1881, sect. 10 of the Trustee Act, 1893, and sects. 1 and 2 of the Land Transfer Act, 1897, respectively, is far from being definitely ascertained. In *In re Parker's Trusts* (L. R. [1894], 1 Ch. 707), Kekewich, J., held that where a last surviving trustee had appointed special executors for the trust property and general executors for his own estate, the latter, after taking out probate, were his personal representatives within sect. 31 of the Conveyancing Act, 1881 (now repealed and re-enacted by sect. 10 of the Trustee Act, 1893), at any rate, until the special executors took out probate. This has generally been taken as deciding that special executors cannot be appointed in respect of mortgage and trust estates, but whether the decision is right or wrong, it decides nothing of the kind. Special executors were always permitted by English law (see *In re Cohen's Executors and the London County Council*, L. R. [1902], 1 Ch. 187), and there is certainly nothing in the Conveyancing Act, 1881, to change the law. Special executors appointed for the mortgage debt would therefore appear to be personal represent-

atives within sect. 30 of the Conveyancing Act, 1881, and special executors appointed for the trust estate, where the trust estate is personalty, would be personal representatives within sect. 10 of the Trustee Act, 1893. Whether special executors could be appointed for a testator's freehold lands within sects. 1 and 2 of the Land Transfer Act, 1897, seems doubtful, since executors and administrators as such never had anything to do with freehold land.

The decision in *Aflalo v. Lawrence & Bullen, Limited* (L. R. [1902], 1 Ch. 264), if correct, would seem to show that from the publisher's point of view the law of copyright is in a very unsatisfactory state. Every person who employs and pays another person to make something for him, whether it is a suit of clothes or a man-of-war, is entitled to the thing for the making of which he has paid. It would seem from the judgment of Joyce, J., that when the thing to be made is an article for a book or encyclopædia, all that the person, who employs and pays the author for writing the article, obtains, is a licence to publish it in the book or other publication for which it was written. The copyright in the article remains in the author, who has been employed to write it and already received value for it, and apparently he may publish it himself immediately after or even before the publisher's book containing it appears, unless there are special circumstances to show that the publisher was to have the copyright. This hardly seems in harmony with common sense, not to say common honesty, nor with the judgment of Jervis, C.J., in *Sweet v. Benning* (16 C. B. 484), where the learned judge says, "We all remain of the same opinion—that where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the

proprietors and publishers thereof, shall be the property of such proprietors and publishers." It is true that in *Lamb v. Evans* (1893, 1 Ch. 218) Lindley, L.J., seemed to suggest that under ordinary circumstances the copyright would remain in the author, and it was for the publisher to show that the intention was that it should vest in him. But it is submitted that once it was held that no express contract that the copyright should belong to the publisher was necessary to vest the copyright in him, then the general rule prevailed—namely, that the person who employs and pays a person to make or invent anything for him is entitled to the thing when made or invented. *Aflalo v. Lawrence & Bullen* is under appeal, and it is very desirable that the law on the point should be definitely settled.

J. A. S.

Herdman v. Wheeler (L. R. [1902], 1 K. B., 361; 71 L. J., K. B. 270; 86 L. T., K. B. 48) is interesting on several grounds. It decides, in accordance with *Lewis v. Clay* ([1897], 67 L. J., Q. B. 224), that a bill is not negotiated by delivery to the payee for value, and incidentally it criticises the language of the Bills of Exchange Act, 1882, and attenuates a strongly expressed opinion of the late L.C.J. The facts of the case are interesting also. A paper bearing a bill stamp which would cover £75, was signed in blank by the defendant, and handed by him to an agent with instructions to fill it in for not more than £15. The defendant was a clergyman. The agent being of moderate mind filled it up for only £30, inserted the name of the plaintiff as payee, received from him the proceeds, misapplied them, and last of all, died. In these circumstances the payee who was the holder sued the maker. The case really turned upon the construction of s. 20 of the Act, which is to the effect that such a paper, so delivered, must be filled up strictly in accordance with the authority given, provided that any such instrument

after completion, negotiated to a holder in due course, is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given. The main point was, as Channell, J., pointed out, the question, whether the note was "negotiated" to the plaintiff within the meaning of the proviso, and the Court came to the conclusion that it was not, because, *inter alia*, s. 2 defines "the first delivery of a bill or note complete in form to a person who takes it as holder" as "issue," and held that, if the proviso had been intended to include the present case, the appropriate words would have been "such instrument after completion is issued or negotiated." The Court (Lord Alverstone, L.C.J., Darling and Channell, JJ.) also considered that for the word "holder" in s. 29 should be read the words "payee or indorsee," and they questioned whether the "transferred from one person to another" of s. 31 meant transferred from one holder to another, or whether it permitted an agent to be the transferring person. Then with respect to the opinion expressed by the late L.C.J. in *Lewis v. Clay*, that a payee cannot be a holder in due course, Channell, J., in reading the judgment of the Court, said, "it appears that "this was a dictum only, and that the L.C.J. overlooked "the definition of a holder in s. 2, which is 'holder means "the payee or indorsee of a bill or note who is in possession "of it or the bearer thereof.' On the whole, therefore, we "are not prepared to hold that a payee of a note can never "be a holder in due course; but it is, as it seems to us, just "as unnecessary for us to decide the question as it was for "the late L.C.J. to do so in the case before him." *Obiter dicta* have not unfrequently sprung up as dangerous weeds by the legal wayside.

Another interesting case on the Bills of Exchange Act is that of *Gordon v. London, City and Midland Bank* (L. R.

[1902], 1 K. B. 242; 71 L. J., K. B. 215; 86 L. T., C. A. 98), in which a clerk, for a series of years, paid to his own account at one of the country branches of the Defendant bank cheques which he stole from his employer. To such cheques as were to the order of the employer he forged the endorsement, and on the back of all the cheques, whether to order or bearer, he wrote his own name. Some cheques were uncrossed when he paid them in, but all cheques, whether crossed generally or uncrossed, were crossed by the branch to the head office by means of a stamp. Most of the cheques were drawn on other than the defendant's bank. But some were drawn on branches of their bank other than the branch at which they were paid in, and some were drafts signed by the manager of a branch requiring the head office to pay on demand a sum of money on account of the branch. One cheque was marked "Not negotiable." In all cases the customer was immediately credited with the amounts he paid in, and he was allowed to draw against them before they were cleared. If it had not been for this instant crediting, his account would have been constantly overdrawn. The employer, the true owner of the cheques, brought an action against the bank as persons who had dealt with the cheques in a manner amounting to conversion. The Court (Collins, M.R.; Stirling and Mathew, L.JJ.) decided that the taking by the bank of the endorsement of the clerk was a conversion of the cheques at common law (*Fine Art Society v. Union Bank of London*, L. R. [1866], 17 Q. B. D. 705; 55 L.T. 536), and that by treating the crossed cheques as cash, and at once crediting the customer with the amount which the cheques represented, the bank constituted themselves holders for value and were collecting the money for themselves. On these grounds the bank was outside the scope of s. 82 of the Act, which protects a banker from liability to the true owner by reason only of having received payment for a customer of a crossed cheque

to which the customer has a defective title. With regard to the uncrossed cheques on other banks with forged endorsements, as the bank had dealt with them in such a manner as to constitute conversion, they could not purge the conversion and come under ss. 77 and 86 by subsequently crossing the cheques. The drafts by one branch upon another were held not to be within the Act at all. In dealing with the cheque marked "Not negotiable," the Bank was clearly outside the scope of s. 82. If the large joint stock banks who have many country branches were to act upon the decision and refuse generally to allow a customer to draw against a credit cheque until it was cleared, a great deal of commercial inconvenience would ensue, but probably they will run the risk of continuing the old practice—at any rate, in the case of cheques drawn to the order of the customer. A rule of requiring a customer to endorse all cheques paid in by him has its danger as well as its advantage.

The case of *Claridge v. South Staffordshire Tramways* (L. R. [1892], 1 Q. B. 422; 66 L. T. 655; 61 L. J., Q. B. 503) has for years been a stumbling block in the law of Bailments. It was decided by Hawkins and Wills, JJ., and was one in which a horse, entrusted to the plaintiff with liberty to use it, was, while being driven along the highway, injured through the negligence of the defendants. The decision was, that as the plaintiff was under no liability to his bailor, he could not recover. It was rather a strong judgment in one sense, for it was said in the course of it "that the mere statement of the proposition that the plaintiff, the bailee of a horse to which injury was done while in his possession by a third person, was entitled to recover from the wrong doer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff as towards his

bailor, is enough to show that it cannot be true." And leave to appeal was refused. Nevertheless the proposition was by many persons viewed in a different light, and in 1895 the late M.R. (Sir A. L. Smith) said, in *Meux v. Great Eastern Railway* (L. R. [1895], 2 Q. B. 387), that "Claridge's case may possibly require at some future time further consideration." The further consideration has now been given in "*The Winkfield*" (L. R. [1902], P. 42; 71 L. J., P. 21), an Admiralty appeal case to which a reference will be found on p. 354.

For the successful party in an action, so much has been done by the new Rules in the matter of costs, that he can no longer be an object of commiseration; but it is possible that, under existing Rules of earlier origin respecting the same matter, a little sympathy may in some cases be not unworthily bestowed upon the unsuccessful party. This is suggested by *Brown v. Houston* (L. R. [1901], 2 K. B. 835; 85 L. T. 159), one of the latest cases in which Sir A. L. Smith gave judgment. The action was one for libel and slander, in which the defendant set up pleas of justification and of privilege. On the plea of justification he was defeated; but as the judge at *Nisi Prius* held that the occasion was privileged, and as the jury found that the allegations, though unwarranted, were made without express malice, the defendant succeeded on the second plea, and judgment was entered for him with costs. In these cases, where a party sets up two pleas and gains one but on the other fails, the rule is that he who substantially succeeds on the whole record is entitled to his whole costs, except those which relate to the plea on which he has failed, and minus the other party's costs on that issue. So far the rule would commend itself to everybody who was not one of the litigants. But it is modified by the provision that the costs excepted must relate exclusively to the issue on which the

party who is entitled to the general costs has failed. This is well illustrated in the leading case of *Harrison v. Bush* (5 E. & B. 344, 1855; Lord Campbell, C.J.; Coleridge, Wightman and Crompton, JJ.), in which it was held that the plaintiff who had defeated the plea of justification was not entitled to costs of witnesses called by him for that purpose, on the ground that as their evidence tended to show malice, it was applicable to the general issue as well as to the issue on justification, whilst the defendant was allowed costs of witnesses called by him to prove the truth of the libel, as their evidence tended to disprove malice. This rule was applied to the case under notice, though not without some comments from the Bench. Vaughan Williams, L.J., said, "the result of the rule in *Harrison v. Bush* is, that where a man has gone down to trial to prove untrue allegations to be true, he is to receive the costs of witnesses whom he adduced to prove the falsehood." In such cases, therefore, the plaintiff, though he free himself from a false imputation by defeating the plea of justification, gains but a barren victory, and a costly one, for on him falls the expense not only of refuting the unfounded charge against himself, but of actually supporting it. But all the judges held that the rule has existed too long to be altered now, and the only means by which any injustice which it may work can be obviated is by a special order as to costs made by the judge at the trial at *Nisi Prius*.

T. B.

It would, perhaps, be difficult to find a case better illustrating the extremely artificial system of Compulsory Pilotage and its effects than the *Bristol City* (L. R. [1902], P. 10). For the safety of ships, cargoes, crews and passengers, primarily, and to provide expert pilots for service in time of war, by securing them adequate remuneration in time of peace, vessels coming to or leaving British ports are *prima facie* compelled to employ pilots: from this general

compulsion certain exemptions have from time to time been made by Parliament or under the authority of Orders in Council in favour of small vessels, regular traders, vessels in their own port, &c., and, *inter alia*, vessels of which the master or mate holds a pilotage certificate for the place; but the master or mate can only get a certificate for the ship of which he is master or mate or for other ships belonging to the same owner. If the master or mate has such a certificate, the presence of a regular pilot on board is not compulsory. The important point however is, that if a collision takes place the shipowner is not liable, though the fault is in his own ship, if it is the fault of a pilot compulsorily employed, but is liable if he is voluntarily employed. Hence he naturally tries, if he has a pilot on board, to prove that he was compelled to have him.

In this case the master of the *Bristol City* had a certificate granted in 1891, and annually renewed up to the date of the collision, to pilot the *Jersey City*, Charles Hill & Sons, owners. At the time of the collision the *Jersey City* and the *Bristol City* belonged to the same line of steamships, but the ownership of the shares was different in the two vessels, though Charles Gathorn Hill was the registered managing owner of both vessels, to satisfy the requirements of the Merchant Shipping Acts which require an individual and not a firm in that capacity; Charles Hill & Sons were the principal owners of both vessels and managers of the line of steamships. The vessel had at the time of the collision another duly licensed pilot on board, and the question was, whether in the circumstances his employment was compulsory or not.

The President held, whilst pointing out the difficulties, that as the ownership of some of the shares in the *Jersey City* had altered since the certificate was issued, and also as the owners of the two ships were not identical, that the certificate was not good probably for either vessel, but

certainly not good for the *Bristol City*, and that therefore the other pilot was compulsorily employed, and the owners of the ship not liable for the damage. The case on the Act of Parliament is plain enough, but it seems a sort of travesty of law, that the right of a person whose ship is injured or perhaps sunk in a collision to recover compensation should depend upon the question whether one out of sixty-four shares in another ship has or has not changed hands since the day on which a master got his certificate as pilot, whether that share was one in the ship actually in fault, or in another for which the certificate was originally granted. Should the scheme of a universal international law of collision drafted by the International Law Association be adopted, all these artificial and intricate questions as to compulsory pilotage would cease to be of interest, as under it, adopting the law of France and most other countries, compulsory pilotage ceases to be an excuse for the ship-owner, on the principle that though a special pilot may be compulsorily employed he is not put in command of the ship, but, in the words quoted by the late Lord Esher, a "guide, philosopher and friend," or a "living chart," to help the captain. In fact the position he would hold would be much that of the Master in former days in the Royal Navy, whose appointment, indeed, was as master and pilot of the ship to which he was appointed. Such a change would certainly get rid of the inconvenience of divided counsel, and would give the injured person in a collision a more secure remedy than he at present has.

The Winkfield (L. R. [1902], P. 42. C. A.) This case, though arising out of an ordinary decision at sea, decides, it may be hoped permanently, a question of the very widest general interest, namely, that a bailee of goods can sue and recover for the loss of them or injury to them from a *tort*

feasor, even though the bailee is under no legal liability to make good the loss to the actual owner.

The *Mexican*, carrying mails from South Africa, was sunk in a collision; there were various questions relating to the special Admiralty rule of dividing the damages where both vessels are to blame, and also as to the limitation of liability of wrong doers in collision actions, to which it is not necessary to refer; but in the result, the claims of all sorts actually allowed by the Admiralty Registrar amounted to £75,810, including one of £5,145 by the Postmaster-General, on account of registered letters and other parcels either the actual property of the Post Office or in respect of which the Postmaster-General had received written authority to sue, whilst a claim of about £1,700 in respect of the residue of the Mail, for which no claim had been made upon the Post Office was disallowed. As the whole amount to be distributed amongst the claimants in the Limitation suit only amounted to £32,515, the allowance or disallowance of the £1,700 claim did not affect the *Winkfield*, whose liability was limited to the sum mentioned, but affected all the claims, as if allowed, it would reduce the dividend of everyone concerned by about 1 per cent. The President upheld the Registrar's disallowance of this item, considering himself bound by the decision of a Divisional Court in the case of *Claridge v. South Staffordshire Tramway Co.* (L. R. [1892], 1 Q. B. 422). It is not often that the decision of a case requires an inquiry into the very foundations on which the Common law of the country is founded, and to what degree it has been influenced by the precepts of the Roman Civil law. The Master of the Rolls in delivering the judgment, in which the other members of the Court, Stirling and Matthews, L.JJ., concurred, whilst distinctly overruling *Claridge's Case* (*ubi sup.*), and therefore reversing the decision of the Court below, reviewed the law from the earliest reported cases, a proceeding which must have been

congenial to a former Editor of "Smith's Leading Cases," and summed up in the words of Lord Campbell in *Jeffries v. Great Western Railway Co.*: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title, in himself is a wrong doer and cannot defend himself by showing that there was title in some third person, for *against a wrong doer possession is title*. The law is so stated by the very learned annotator in his note to *Wilbraham v. Snow* (2 Wms. Saund. 87)." The law could not have been emphasized more strongly than in a case like this where the Postmaster-General was claiming for the loss of letters in his charge, but on board a ship which was not his property or that of the Crown.

SCOTCH CASES.

The Sale sections of the Mercantile Law Amendment Act, Scotland, 1856, carried into effect the recommendations of the Mercantile Law Commission of 1853, as contained in their second report issued in 1855. This report, after stating in general terms the differences between the laws of the two countries and the effect of the Scottish law, which at that time left goods sold but not delivered at the mercy of the seller's creditors, expressed the opinion that "as to this matter the rule of the laws of England and Ireland is preferable to that of the Scottish law" (p. 8). Further on, the commissioners state that they do not think it desirable that any general change should be made in the Scottish rule "that the right of property in goods is not transferred from a seller to a buyer by a contract of sale until this is followed by tradition or delivery of the goods" (p. 9). The change suggested in the law of Scotland was of a partial nature, and was intended to protect the buyer against certain special forms of injustice, but not

to abolish or change the general rule which the commissioners say is "extensively interwoven with other departments of the law of Scotland" (p. 9). In other words, the change was to affect exclusively the law of sale, and not to change the law in other branches, among which we may reasonably presume the commissioners meant to include securities. Unfortunately, the House of Lords in a case, nominally one of sale but really one of security, affirmed a Court of Session decision which had proceeded on the common law, by taking hold of the Mercantile Law Amendment Act as a more feasible ground of judgment (*M'Bain v. Wallace & Co.*, 1881, 8 Ret. 360; 8 Ret. H. L. 106). Since then there has been much confusion in the law of Scotland. This was finally got rid of by the Sale of Goods Act, 1893, which repealed the sale sections of the Mercantile Law Amendment Act, and unreservedly adopted the English principle of passing the property by the contract of sale irrespective of delivery. The adoption of this principle was accompanied by a declaration that the Act should "not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" (sect. 61). The provision seems explicit, and it was given effect to by the Second Division in *Robertson v. Hall's Trustee* (1896, 24 Ret. 120). Lord Young, however, in that case dissented, and it may be judged from two recent cases that he has not yet got beyond the shadow of *M'Bain's* case. The cases now referred to are *Carmichael, Maclean & Co's Trustee v. Macbeth & Gray* (1901, 39 Sc. L. Rep. 188), and *Allan v. Jones & Co's Trustee* (1901, 39 Sc. L. Rep. 263). The former was a clear case of sale, and the transfer of property was unanimously affirmed. Lord Young, however, seemed to go out of his way to make it a security, and again to base his judgment on the usually discarded case of *M'Bain*. *Allan's* case was as clearly one of security, and Lord Young dissented, again founding on

M'Bain's case, but reasoning with great acuteness in order to set aside the effect of the Sale of Goods Act. Space will not permit us to follow his argument; but in our view it is effectually answered by the following sentence of Lord Moncreiff: "I do not doubt that a good security can be effected by means of a sale; but then the sale must be completed by delivery, or by what the law considers equivalent to delivery" (39 Sc. L. Rep., at p. 269).

Certain officers of the Spanish Government in London entered into a contract, in the name of the Spanish Minister of Marine in Madrid, for the building in Glasgow of four torpedo boats, subject to the proviso that the contract should be ratified by the Spanish Government. The contract was duly confirmed by the Spanish Government, and the vessels were thereafter built and delivered. The successors in office of the original parties, including the Spanish Minister of Marine for the time being, now sued the ship-building company for loss and damage to the Spanish Government in respect of delay in delivery. Objection was taken to the instance which it was maintained should have been the Spanish Sovereign and no other. The Spanish Sovereign formally ratified the action after it had been raised; but the Second Division, reversing Lord Low and dissenting Lord Young, held the instance insufficient, and not cured by the subsequent ratification. Much authority was quoted in support of the opinion of the majority; but we share the regrets of Lord Moncreiff that the law should be settled to this effect. It has much of the appearance of red-tape, and seems in the circumstances a practical denial of justice. (*Castaneda v. Clydebank Engineering and Ship-building Company, Limited*, 10th December, 1901, 39 Sc. L. Rep. 231.)

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Select Pleas of the Forest. Edited for the Selden Society by G. J. TURNER, M.A. London: Bernard Quaritch. 1901.

The forest and the beasts of the forest formed, in the reign of King John, a very important part of English life. A "forest," which to-day connotes the idea of an interesting open space available for excursionists and picnic-parties, such as Epping Forest now is, meant in old days an area of land teeming with animals *feræ naturæ*, and these animals sometimes of no inconsiderable value. The criminal to-day finds his temptations in jewellers' shops and banks, or among office-books and such-like documents. In ancient times of our history valuable property ran by his path *alive* day after day; and it was not as valuable property alone that it tempted his covetous eye. There was ever present the sporting instinct common to Englishmen. One cannot read, for instance, the "Pleas of the Forest of Sherwood at Nottingham," set forth in this volume, without a sympathy for the sportsmen sent to prison, and a fellow-feeling with them even in their wrong-doing, created doubtless by memories of Robin Hood and his band. Here is a specimen of these Sherwood Pleas: "It is prescribed and proved that on the Wednesday next after the feast of St. William, Archbishop of York, Robert the son of Agnes Bonde of Edwinstowe and Richard atte Townsend of the same town came by night through the middle of the town of Wellow with two fawns of a hind. And the aforesaid Richard was taken with his fawn by men watching in the town of Wellow, and committed to the stocks of Peter de la Barre of the same town. And the same Robert broke the stocks and fled; therefore the aforesaid Peter found Mainperners to answer. And the aforesaid Richard came, and being convicted of this is sent to prison. . . . And it is witnessed that Robert the son of Agnes is dead: . . . therefore nothing of him." The volume will be of great interest to antiquarians and academic students of law.

Select Pleas. Starrs and other Records from the Rolls of the Exchequer of the Jews. Edited for the Selden Society by J. M. RICC. London: Bernard Quaritch. 1902.

The introduction to this volume is a very important contribution to the History of the Jews in England—a fact appreciated by the

Jewish Historical Society in England, who have co-operated in the production of the work. The question of the supposed "ritual" murders by Jews, which, be the stories true or false, has contributed not a little for many hundred years to produce the unhappy feeling of revulsion towards the race which so many persons in England entertain, is shown to be a real question, and is made the subject of an excellent dissertation. The *Scaccarium Judeorum*, whose records form the principal subject of the book, came into existence at the beginning of the thirteenth century. The Jews at this time were subject to great persecutions; but the king, whose "property" it seems they were in the same sense that "treasure-trove" is the king's "property," did not approve of their being indiscriminately plundered by any unroyal hands. He established "Archae" or Registries of Bonds, to prevent the Jews from being robbed by the destruction of these precious instruments. Then followed the organisation within the Court of Exchequer of a separate tribunal for the trial of Jewish causes. And hence came the records which form the substance of the present publication.

The English Reports. Volumes XII—XVI. Privy Council. Edinburgh: Wm. Green & Sons. London: Stevens & Sons. 1901—1902.

This excellent collection of reports proceeds apace. The volumes before us are all devoted to Privy Council cases: and they contain much interesting and useful matter.

Volume XII includes the report of *Swift v. Swift*, otherwise known as *Swift v. Kelly* (3 Knapp, 257). A marriage having been clandestinely celebrated between Mr. William Swift and Miss Elizabeth Kelly, two English persons resident at Rome, both previously Protestants and one a minor, who in conformity with the Roman law had abjured the Protestant faith and been admitted into the Roman Catholic Church, one of them making such abjuration two days previous and the other immediately before the ceremony, was repudiated by the lady in a suit for restitution of conjugal rights, on the grounds that the priest was not properly qualified to perform the ceremony, and that she had never become nor intended to become a Roman Catholic, her abjuration being made without her knowledge or consent. The Judicial Committee of the Privy Council, reversing the judgment of the Court of Arches, held that, since it appeared by the evidence that the marriage ceremony and act of

abjuration were duly performed according to the Roman Law, the marriage was a valid and subsisting contract, and restitution of conjugal rights was accordingly decreed. This volume, containing Acton's Reports (volumes 1 and 2), Knapp's Reports (volumes 1 to 3), and Moore's Privy Council Reports (volumes 1 and 2), is altogether an important volume of the series.

Volume XIII contains Moore's Privy Council Reports to the end of volume 7 of the original edition. Early in the volume will be found the leading case of *Calder v. Halket* (3 Moore P. C. 30) on the limits of judicial immunity from attack. 'Trespass, it was there said, will not lie against a judge for acting judicially, but without jurisdiction, unless he knew or had the means of knowing of the defect of jurisdiction: and it lies upon the plaintiff in every such case to prove that fact. The present Editor is at pains to include in the volumes before us any available reports of other cases which appear useful for rendering the principal cases more intelligible. Thus, in the first of the cases to which we have referred, viz., *Swift v. Kelly*, he has appended an account of the unreported proceedings in the Court of Arches; and similarly he has given a report of the interesting Irish case of *Tuaffe v. Downes* in the note to *Calder v. Halket*.

Volume XIV contains the same series to the end of volume 12 of the original edition, and records *inter alia* the curious case of *Prinsep and the East India Company v. Dyce Sombre* (10 Moore, P. C. 233). The question was as to the capacity of David Ochterlony Dyce Sombre, who had married the defendant (the daughter of Lord St. Vincent), to make a will. It was held that the *onus probandi* lies upon a party setting up a will made during the subsistence of a Commission of Lunacy. The decision was against the validity of the will in question. The nature of "insane delusions" was also discussed at length.

Volume XV gives us the concluding volumes of Moore's Privy Council Reports and the first two volumes of Moore's "New Series." The important ecclesiastical case of *Heath v. Burder* (15 Moore, P. C. 2) is reported on page 394 of the present edition, where the result of a clergyman of the Church of England propounding doctrines repugnant to those contained in the "Articles of Religion" was elaborately discussed.

Volume XVI consists of Moore's "New Series," volumes 3 to 6. *Fitzgerald v. Fitzgerald* (5 Moore, P. C., N. S., 183), is an interesting

case. A man covenanted by deed to pay a woman an annuity for her life, payable half-yearly for her separate use and free from anticipation. Afterwards he married the woman and died. The question was whether the annuity was extinguished by the marriage. It was held that it was only suspended, and that the widow was entitled to recover arrears accrued subsequently to the death of her husband. These volumes contain numerous important cases on Indian and Colonial law, on Shipping and Admiralty law, on Ecclesiastical law, and on various important departments of law which, in the days when the reports were written, belonged to the Ecclesiastical jurisdiction.

The Critic Black Book. Vol. I. Edited by HENRY HESS. London: British and Colonial Publications, Ltd. 1901-2.

Mr. Hess gives as an apology for the publication of this book a quotation from a speech of the late Lord Chief Justice: "The investing public ought to be placed in possession of all such information as might affect the reasonable judgment of a man in determining whether or not to invest in a particular concern." The present volume contains what the Author calls "The Directory of Guinea Pigs," which claims to be "a record of facts and figures connected with the promotion, direction, and management of joint stock companies in Great Britain." The names of a large number of business-men and others are given in alphabetical order, and after each name is given what might be called his directorial career, with a list of the companies with which he has been connected, and a short indication of their success or failure. It should certainly prove a useful book to consult before investing in a new company, as it gives a ready means of ascertaining how far the directors of the proposed Company have been successful in their other undertakings. The second volume is to contain "a Directory of Secretaries, Solicitors, Consulting Engineers, Auditors, Bucket-shops, and Bankrupts," connected with joint stock ventures of a more or less doubtful nature. An unique distinction is claimed for this work, when it is stated in the Preface that "The largest sum ever offered to any author or editor for the copyright of his work has been offered to me for that of the *Critic Black Book*; and this offer again was doubly unique for it carried with it the statement that the sum running into five figures was offered for the purpose of preventing its appearance."

The Legal Procedure of Cicero's Time. By A. H. J. GREENIDGE, M.A. Oxford: Clarendon Press. 1901.

Those who know anything of the little company of students of Roman law at Oxford, will expect much from the learned producer of so much solid work on both Greek and Roman law and antiquities. They will not be disappointed. Mr. Greenidge's latest work is a most valuable addition to our authorities for the law of the time of Cicero, and even succeeds in throwing light on the dark questions of the *nexum* and the *pro Cæcina* and the meaning of *provocatio* and *judicia populi*. It is interesting, in view of recent proceedings in South Africa, to read the pages about martial law in the days of Cicero. The suspension of ordinary law seems to have occurred, not only in military emergencies, but also in cases of civil discord and epidemics of crime, where the only hope was the unlimited *imperium* of some interrex, dictator, or other authority who should see *ne quid respublica detrimenti capiat*. The principle of the statement on p. 400 would probably be accepted by English jurists. "The magistrates who acted did so at their own peril, and could not shift the responsibility for what statute law regarded as a judicial murder on their advising body by again consulting the Senate as to the proofs of the guilt of the accused, or as to the method of execution to be employed." The second appendix contains a detailed examination of the four speeches of Cicero in which questions of procedure specially arise.

A Contribution to an English Translation of Voet's Commentary on the Pandects. By T. BERWICK. London: Stevens & Haynes. 1902.

This is a revised edition of the first issue—which appeared in 1876—of the translation, with commentary, of Titles XIII, 7, XVIII—XXI. The original work of Johannes Voet is interesting to Englishmen, for it was dedicated to William III in 1698, Voet being then a Professor at Leyden. Voet is a text-book for students in colonies where Roman-Dutch law is in use, and this translation will be a valuable aid to the somewhat crabbed Latin of the original text. It may also be read with advantage by students of the Roman law of the contract of sale, a subject read in the Honour School of Jurisprudence at Oxford. It is quite worthy to take its place by the side of the commentaries on Title XVIII, 1, by Dr. Moyle and Mr. Mackintosh.

Lectures on Slavonic Law. By FEODOR SIGEL, Professor of Law in the University of Warsaw. London: Henry Frowde. 1902.

The Ilchester lectures for the year 1900 form a book which is a worthy successor to the lectures of Kovalevsky and Vinogradoff, which were also given under the auspices of the Ilchester trust. The great difficulty of the book to the critic is that there is probably no one in England fully competent to do it justice. The critic ought to know something of the Byzantine compilations, such as the *Basilica*, the *Prochiron*, the *Ecloga*, and in addition ought to have at least a smattering of about six languages. As it is, the critic can only take what is given him and presume that all is right. It is interesting to see in the Slavonic compilations the course of legal development so familiar to students of Roman law, unwritten custom gradually adopted into written compendia, such as the *Russkaya Pravda*, then attempts at codification by some *absolutisme éclairé*, such as the *Sudebnik* of 1550 or the *Ulozhenie* of 1649. All these are generally strongly coloured by the influence of the Lower Empire. The bibliography appears to be complete, and is probably not the least valuable part of the work. An index would have been useful.

Manual of Naval Law and Court-Martial Procedure. By J. E. R. STEPHENS, C. E. GIFFORD, C.B., and F. HARRISON. London: Stevens & Sons. 1901.

A peculiar importance attaches to the accuracy of such a work as the present, which is doubtless destined to play the part of "the Archbold of the sea." The accuracy of an Archbold is a serious matter enough, seeing that most tribunals take its contents for gospel, and few verify its statements: but the book before us must sometimes be used *at sea*, where original authorities are not available, and where, therefore, its pages must often inevitably be final. Thring's *Criminal Law of the Navy* has long been unrivalled as the accepted text book upon the subject. This "manual" embodies that text-book, with the Naval Discipline Acts and the Admiralty Regulations, Instructions, etc., proper to the subject, and brings the whole work up to date. A copy of this book should be found in the libraries of all H. M. ships. It seems to us to have been industriously compiled and to be admirably suited to fulfil its purpose. Naval officers have to perform legal duties far more

responsible in some cases than even those which devolve upon justices of the peace on shore, and without half the assistance which justices of the peace are able to obtain. They have enormous—but not unlimited—powers. It is therefore most important for them to understand both their powers and the limits of them. These matters are clearly and lucidly explained in the fourteenth chapter of this book, where *Fabrigas v. Mostyn* (1 Sm. L. C. 594) and the other principal authorities upon the subject are discussed. Sailors need not be afraid of Courts of Law so long as they try to do their duty in these matters: more especially is this true in time of actual engagements, for “*inter arma silent leges*.” But a good officer ought to desire to be well equipped in this matter, as in all others pertaining to his duties: he must study the subject when he has the leisure, in order that he may act in the spirit of the legislature or the common law, as the case may be, when the moment for judicial action arises. Even at sea, the Criminal law is an important part of a good administration: and the best administered service of the country, like other departments of the State, depends upon the well-ordered performance of this duty. This book will be of real assistance to those concerned in the administration of Naval law and in Court-Martial Procedure.

John Marshall. By JAMES BRADLEY THAYER. Boston and New York: Houghton, Mifflin & Co. Cambridge: The University Press. 1901.

Constitutional law, in the American sense of this expression, is a necessary part in these days of a great lawyer's mental equipment: and this study will involve the consideration of such a mind as that of Chief Justice Marshall. This little book does not pretend to be more than a sketch of its subject; but there is enough in it to form a valuable introduction to American Constitutional law. This law, and the method of its interpretation by the Courts of the country, is a matter of great importance in the history of a nation. The general conclusion arrived at by Mr. Thayer is perhaps worth a citation. “The people of the States,” he says, “when making new constitutions, have long been adding more and more prohibitions and restraints upon their legislatures. The Courts meantime, in many places, enter into the harvest thus provided for them with a light heart, and too promptly and easily proceed to set aside legislative acts. The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it . . . the people

all the while become careless whom they send to the legislature." There is no small measure of thought here crammed into a limited space : and the book should not be looked upon as being of any less importance by reason of its brevity, that very brevity being in truth one of its chief excellencies.

Procedure as to Firms, Companies, and Societies. By R. E. ROSS, LL.B. London : Sweet & Maxwell. 1902.

A busy junior at the Bar will find this book useful. The procedure which it contains is exactly that part of the law which he most often requires to consider in a hurry. Instead of pursuing his subject through the learned but lengthy pages of the "Annual Practice," he will find it here succinctly arranged by one who evidently understands the matter thoroughly. Anybody acquainted with the practice of the High Court of Justice knows how intricate this subject is, and will appreciate the labour entailed in the condensation of the whole subject into a handy book of 158 pages, for which the thanks of the profession are due to the learned author

The Law of Interpleader as administered by the English, Irish, American, Canadian, and Australian Courts. By ROBERT JAMES MACLENNAN. London : Stevens & Sons. 1901.

To the aspiring legislator in any country upon this subject, Mr. Maclellan's work would be full of valuable suggestion and information. For the practical lawyer it is too cosmopolitan to be of great value in every-day practice. Still, any person desiring to study this question deeply, and to arrive at the "last word" upon it, might certainly do worse than consult these pages.

The Law relating to Workmen's Compensation under the Workmen's Compensation Acts, 1897 and 1900. By WILLIAM BOWSTEAD. London : Sweet & Maxwell. 1901.

Agricultural labourers now reap the benefit of the Workmen's Compensation Act, and it is to be hoped that the short enactment which brings about this result will not tend to the multiplicity of problems which the principal statute has called forth. Mr. Bowstead has, of course, little to tell us at present on the subject of the Act of 1900, but what little he does tell us is to the point. He has collected and analysed the effect of the decisions of the Court of Appeal upon the Act of 1897 with laborious industry.

The Law relating to Cheques. By ERIC R. WATSON, LL.B.
London: Sweet & Maxwell. 1902.

It was a good notion to initiate a discussion on the law relating to cheques as an altogether separate sub-department of the law of England. Cheques are very often difficult instruments to deal with when we have to consider their legal effects, for the law concerning them is somewhat apt to be involved with the general law concerning ordinary bills of exchange. Now a banker's cheque is a very special kind of instrument; and some exceedingly pretty problems may be raised regarding it. If a banker's cheque be included in the expression "bill" for all purposes, several rather startling results may follow. Take, for instance, the statute 5 & 6 Will. IV, c. 41, "An Act to amend the law relating to Securities given for considerations arising out of gaming, usurious, and certain other illegal transactions." Mr. Watson has cited the pertinent English authorities upon that statute; but for his next edition we commend to his careful consideration the Irish case of *Lynn v. Bell* (10 Ir. R., C. L., 487), decided under section 2 of the Act. Betting men would be astonished at some of the results which could be deduced from that decision. Is the case well decided? Until the question is raised in an English Court, the case of *Lynn v. Bell* is worthy of study. We agree with the observation made by Mr. Watson, p. 43, that the Gaming Act, 1892—statute 55 & 56 Vict., c. 9—does not affect the law in this respect, though a certain learned County Court judge has decided the contrary, and has come to a conclusion opposite to that established in *Lynn v. Bell*, on the strength of the Act of 1892. Mr. Watson's book, though contained in cardboard covers and to be obtained for half-a-crown, is a little treatise of considerable practical use and value.

The Practice of the Commercial Court. By THEOBALD MATHEW.
London: Butterworth & Co. 1902.

These pages have been written, as we are told in the Preface, to provide information as to what force the Notice as to commercial causes possesses, what actions are commonly transferred, what form of pleading should be employed, and what rules of evidence are observed. These are subjects well worthy of consideration, and the treatment which they receive is admirable. The whole of this little book will be read in an hour; and we can imagine no more

profitable manner in which a practitioner with his first case in the Commercial Court could spend an hour than in reading Mr. Mathew's pages. Some Commercial Court pleadings have filled us with amazement: for we have been unable to discover wherein the "points of claim" and "points of defence" differed from other pleadings, or what time or space they saved. Not so with Mr. Mathew's "points." The whole idea of the "point" system stands out clearly from these instructive pages. Mr. Mathew, in his introduction, cites a few lines from the "Edinburgh Review" which seem worth repeating here: "It has been said truly enough in one sense, that there is no such tribunal as a Commercial Court, and that there is simply one judge of the High Court who is selected to try a particular class of actions which are entered for trial. But here again we must take facts as we find them, and the fact is, that to all intents and purposes there is a Court, or a Division, call it what you will, specially organised for the purpose of trying commercial cases." To disseminate a true view of the methods adopted by this Court, the little book before us will be invaluable.

Ruling Cases. By ROBERT CAMPBELL, M.A. London: Stevens & Sons. 1901.

This voluminous work is now complete. "Will" is perhaps the most important title covered by the concluding volume. No less than thirty-seven ruling cases which relate to Wills are reported. If only these volumes and their notes were carefully studied by every student at the commencement of his career, and noted up with the Reports as years go by, the often-lamented days of good "case-lawyers" would return. But how long will these "ruling cases" rule? It is hard in these days to say.

The Annual Digest, 1901. By JOHN MEWS. London: Sweet & Maxwell. 1902.

The Yearly Digest of Reported Cases, 1901. By EDWARD BEAL. London: Butterworth & Co. 1902.

Analytical Digest of Cases published in the Law Journal Reports, Vols. LXV—LXIX, and the Law Reports from 1896 to 1900. By JAMES S. HENDERSON. London: Stevens & Sons. 1901.

Boswell tells us, in connection with Dr. Johnson's celebrated dictionary, that the Author "received our compliments upon that

great work with complacency, and told us that the Academy della Crusea could scarcely believe that it was done by one man." We feel much the same about these monuments of industry. Was each of them "done by one man"? That one man in each case had but little time for the doing. Mr. Mews—who deserves and will probably receive an almost immortal name in the years to come for all that he has done in this description of work—has earned the gratitude of every practising lawyer, and he continues, year after year, to earn it still. And indeed all the Digests before us appear to have been most carefully compiled.

Cromwell on Foreign Affairs. By F. W. PAYN. London: C. J. Clay & Sons. 1901. The title of this small volume is somewhat misleading, to the legal reader at any rate, as on opening it we find that it is not devoted to Cromwell alone, but contains in addition six other essays on subjects of great interest to International jurists—two of which, "Intervention among States" and "Neutral Trade in Arms and Ships," our readers have already been made acquainted with, as they appeared in 1899, in the February, May, and August issues of this Magazine, and the February issue, 1901. The other essays are on "The Burning of Boer Farms and the Bombardment of Coast Towns;" "The extent of Territorial Waters;" "Nelson and the Admiralty." Mr. Payn's style is already well-known to our readers, and it will perhaps be sufficient to say that the essays are full of much useful matter, and should be read with interest at the present time when peace in South Africa has not yet been declared, and the word "Imperialism" is on everyone's lips.

Every Man's Own Lawyer. By a Barrister. London: Crosby Lockwood & Son. 1902. "*Ignorantia juris non excusat*," therefore let every layman forthwith purchase a copy of this "Complete Epitome of the Laws of England," and having succeeded in completely muddling his brain by endeavouring to find out "the rights and wrongs of individuals" in general and his own in particular, he should then consult his solicitor, when he will probably become convinced that a "little knowledge (of the law) is a dangerous thing." Joking apart, this "Handy Book of Law and Equity," which has reached its thirty-ninth edition, is not without its value for ready reference. It has been enlarged by about forty pages, and is provided with a good index. It contains all the legislation of 1901;

together with a concise Dictionary of Legal Terms. The various legal subjects dealt with in the sixteen parts into which the book is *divided are too numerous for us to mention here*, but as a key to the laws of this country they are ample and admirably arranged, and, without doubt, the mere possession of a copy of the book should go far to prove Selden's presumption that "Every man (who owns a copy) must be taken to know the Law."

A History of Police in England. By Captain W. L. MELVILLE I.E.E. London: Methuen & Co. 1901. The Author of this interesting history has done his work most thoroughly. After giving us a peep at the Anglo-Saxon Police of the tenth century he brings us on through each succeeding period until we are left with the English Police of the twentieth century. There is much information in the volume that Members of Parliament, Magistrates and others, will find extremely useful and interesting, but we think that the book will perhaps effect the greatest possible good if in the words of the Author its "pages by adding their quota to the scanty sources of information on the subject, may cause a corresponding increase in the tribute of public goodwill that has been so well earned, and so long awaited by the Police forces of England."

Recent Object-lessons in Penal Science. By A. R. WHITEWAY, M.A. London: Swan Sonnenschein & Co. 1902. The Author of this interesting book is a Corresponding Member of the Academy of Legislation of Toulouse, and is known to our readers as the writer of an instructive article on legal literature in France, which appeared in our August issue of last year. Many of the chapters have already been published in various Reviews and Magazines as separate articles, but to those engaged in the study of Penal Science it will be a great convenience to find them collected together in a form handy for reference, supplemented by a very full index and a most useful bibliographical index, which embraces foreign as well as English books.

Gleanings from the Wisdom of Lord Watson. By R. M. WILLIAMSON, M.A., LL.B. Glasgow and Edinburgh: Wm. Hodge & Co. 1902. We agree with the compiler of this little work, who is an Advocate at Aberdeen, that there is no more profitable task for a

lawyer to set himself than to read through, in his spare moments, the opinions delivered by our eminent judges. He will be rewarded by finding in its original setting many statements of the law, the substance of which he has hitherto known only in the dry bones of students' manuals. He will be surprised by the frequency with which, as he turns over the pages, he finds authority on some question which has arisen in his own practice, and the opinion will be forced upon him that however complete Digests may be, a great amount of legal wisdom and authority remains hidden in the Reports themselves. Mr. Williamson has put his views on this matter into practice, and has produced an admirable little collection of the opinions of Lord Watson. These, as Lord Macnaghten says, "are worth studying," and we have no doubt the "Gleanings" will find many appreciative readers.

Marine Insurance. By LAURENCE DUCKWORTH. London: Effingham Wilson. 1901. This is a convenient and trustworthy epitome of the Law of Marine Insurance, intended for the use of business men. It certainly should be useful to them. We notice it was published too early last year to contain a reference to the amendment of the Stamp Act, 1891, made by 1 Edw. VII, c. 7, s. 11, which allows time policies to contain continuation claims. A considerable portion of the work is devoted to a summary of the provisions of the Marine Insurance Bill, 1898. This is also carefully referred to in the Index; but it would have increased the value of the book if the Index had been somewhat amplified.

The Law relating to the reconstruction and amalgamation of Joint Stock Companies. By PAUL F. SIMONSON, M.A. London: Effingham Wilson. 1902. We have here a very successful experiment in boiling down a large subject into a small space. It is a very good first view of the law of "reconstruction" and "amalgamation."

Conveyancing in New Zealand. By THOMAS F. MARTIN. London: Stevens & Sons. 1901. The Colony of New Zealand was constituted on January 14th, 1840. The legislature of the colony had then to make for itself or to adopt from English statutes a law of real property suitable to the conditions which it found in the country. How far English institutions were adapted to New

Zealand requirements and how far the Colonial Government framed original ordinances are matters about which Mr. Martin has much to say, and he says it well and lucidly.

NEW EDITIONS.

Second Edition. *The Companies Act, 1900.* By PAUL FREDERICK SIMONSON, M.A. London: Effingham Wilson. 1901.

This edition is slightly enlarged by the inclusion of the cases decided under the Act, of which Mr. Simonson considers *Burrows v. Matabele Gold Reef and Estates Co.*, the "only one likely to have far reaching effects." It also has the useful addition, in Appendix II, of the forms prescribed by the Board of Trade of the documents liable to registration. With its careful notes and excellent type it is a pleasure to consult the work.

Second Edition. *The Law and Practice relating to Patents, Trade Marks, and Designs.* By DAVID FULTON. London: Jordan & Sons. 1902.

It is probable that this book will take a permanent place in the law library as a short compendium upon a very large subject. The information is copious and well arranged, and the excellent table of cases showing at a glance the nature and short effect of each is a feature which might well be generally adopted by the writers of text books on other subjects.

Second Edition. *Food and Drugs.* By CHARLES J. HIGGINSON. London: Effingham Wilson. 1902.

Until the coming of the most desirable statutory consolidation of the very puzzling Acts of Parliament relating to the sale of food and drugs, we feel sure that solicitors, public analysts, traders and others—for whom this manual is intended—will find it most convenient to consult its pages. The little book is arranged in the form of a consolidation, and the sections are placed according to their logical order, and not according to the order in which they were enacted. Thus, the definition of "food" is contained in the statute 62 & 63 Vict., c. 51, the last enactment upon the subject; but it is

here placed, as it should be, first. This is logical. Let us always understand in the first place what it is we are speaking about, and *then* let us discuss it. This was the method of Euclid. So, throughout, Mr. Higginson has adhered to the natural sequence of propositions; and *en passant* he has shortly explained the case law. At the same time the work is evidently not intended as a profound treatise upon the subject; and, of course, it is nothing of the kind. It is, however, a most convenient *vade mecum* for practical purposes—short of the High Court.

Third Edition. *The Law of Property.* By J. ANDREW STRAHAN, M.A., LL.B., assisted by J. SINCLAIR BAXTER, LL.B. London: Stevens & Sons. 1901.

Mr. Strahan has not, we think, made any very material alterations in the present edition, beyond the addition of recent decisions and a certain amount of expansion. The book is remarkable for the qualities at which the Author, in the preface to the first edition stated he aimed, namely, conciseness and clearness. The arrangement is systematic, and the Author has, so far as it is possible, considered the laws of realty and personalty together. The book is divided into seven parts, dealing respectively with: Ownership and things owned; kinds of interests in things; modes of holding interests; modes of acquiring interests; rights over things owned by others; proprietary rights not over things; and persons under disabilities as to property. A good general view of the principles of law applicable to each of these headings is given unencumbered by details. The work is thoroughly well adapted for the use of students or young practitioners, and is, indeed, largely used for the purposes of legal education. We should like to call special notice to the references to Irish Cases and the Appendices dealing with the Irish Land Acts, which are the work of Professor Sinclair Baxter.

Third Edition. *The Law of Fraud and Mistake.* By WILLIAM WILLIAMSON KERR. This Edition by SYDNEY E. WILLIAMS. London: Sweet & Maxwell. 1902.

We had supposed that the great case of *Derry v. Peek* (14 App. Ca. 359) had once for all disposed of the suggestion that "fraud" of any description could exist without moral obliquity. The Editor

of this book evidently belongs to that school of thinkers which approves of such expressions as "legal fraud" and "constructive fraud," and which considers that there is still a place for such expressions in a true exposition of the Law of England. We do not agree with him; any such expressions are abhorrent to the law of England, and the fallacy involved in them necessarily colours the whole of the Author's book. Lord Bramwell, in the above-named case, said: "I do not think we need trouble ourselves about 'legal fraud' or whether it is a good or bad expression I cannot think the expression 'convenient.' I do not think it is 'an explanation which very clearly conveys an idea': at least I am certain it does not to my mind. I think it a mischievous phrase and one which has contributed to what I must consider the erroneous decision in this case." The Editor of this book says: "Moral fraud is not necessarily legal fraud, for moral fraud however gross is not fraud in law unless it induces damage. The expression therefore is useful as marking a distinction which is real. In the same way the expression 'constructive fraud' though little more than a *nomen collectivum* is useful as pointing to a class of cases in which though there may be an actual fraud the same consequences follow."

There is here, in our opinion, a confusion of thought. Fraud is fraud—both in law and in fact—whenever there is intentional dishonesty, and never when there is not. An action brought for damages, it is true, will not succeed unless damage can be shown as well as fraud; but that is a separate matter altogether. The Editor should, we think, have frankly accepted the decision in *Derry v. Peek*, as being now the true view of English law: any attempt to whittle it away is mischievous: and we distrust every argument on fraud which is grounded on such a view as that enunciated at the beginning of this work. As an index to cases on the subject the work is valuable, but as a legal treatise on the subject it leaves for the above reasons something to be desired. The Editor speaks as though it were a question of names. We think that it is not. This must, of course, always be to some extent a matter of opinion, and we have simply recorded our own.

Third Edition. *The Solicitor's Clerk*, Part II. By CHARLES JONES. London: Effingham Wilson. 1902. Solicitors' clerks have found this book useful in the past: and will do so in the future. It is not to be regarded so much a law-book as a lesson in the

"ropes" of the work given by an old hand to a beginner. Not a little law may, however, be picked up from it by the industrious student.

Third Edition. *The Investment of Trust Funds under the New Law.* By R. DENNY URLIN.

Fourth Edition. *Investment in Houses and Land.* By R. DENNY URLIN. London: Effingham Wilson. 1902. These manuals for laymen are useful for their purposes, and state the law as accurately as may be in accordance with the space occupied.

Third Edition. *The Companies Acts 1862 to 1900.* By A GLYNN-JONES. London: Jordan & Sons. 1902.

Twenty-fourth Edition. *Handy book on the Formation, Management, and Winding Up of Joint Stock Companies.* By F. GORE-BROWNE, K.C., M.A., and WILLIAM JORDAN. London: Jordan & Sons. 1902.

These two little books, of the same size and shape, should be read together: and to the law student of an economical turn of mind will form the best purchase for a small sum which it is possible to add to the private law library. Mr. Gore-Browne's book in particular is a model of compression. The work is admirably brought up to date. *Keatings v. The Paringa Consolidated Mines* (1902 W. N. 15) was, it is true, decided too late for inclusion in the text, but its effect is duly noted in the preface. Mr. Glynn-Jones has prepared a most conveniently arranged edition of the relevant statutes, which is admirably printed. The two books together contain—for practical purposes—the most important part of the law which will be required by students of Company law.

Fifth Edition. *The Acts relating to the Income Tax.* By the late S. DOWELL, M.A. This edition by JOHN E. PIPER, LL.B. London: Butterworth & Co. 1902.

The standard work upon the Income Tax is, of course, a volume of much importance. The law is not simple; and since immense sums are involved, every question which can legitimately be raised is sure to demand consideration sooner or later. It is impossible in the space at our disposal to discuss this subject in detail. Financial

statutes cannot be understood except by careful comparison of each part, with some historical knowledge as to the legislation of past years. It is pre-eminently a subject for a specialist: and to become a specialist we can recommend no more probable path of success than a careful study of Mr. Piper's excellent edition of this work.

Fifth Edition. *Principles of Equity.* By JOHN INDERMAUR. London: George Barber. 1902.

Mr. Indermaur's manual is already well known to students, and in the present edition he has brought it up to date. The borders of Equity and the Common law are not always easy to define. The *first* general maxim of Equity, according to Mr. Indermaur, is "Equity will not suffer a right to be without a remedy." Now, the Common law long since recognised the rule "*ubi jus ibi remedium*," and a student will be somewhat bewildered to discover the distinction. The Author is on safer ground when he discusses "matters specially assigned to the Chancery Division of the High Court of Justice by the Judicature Act 1873," and these form the principal subject of his book. Of course, each of these "matters specially assigned" contains enough problems to fill a book by itself, but an outline of each, sufficient for students' purposes, will be found here, and for such an outline, carefully revised to date, there is sure to be a good demand.

Seventh Edition. *Principles of Contract.* By Sir FREDERICK POLLOCK, Bart. London: Stevens & Sons. 1902.

Conditions of Contract relating to Building Works. By FRANK W. MACEY, assisted by B. J. LEVERSON. London: Sweet & Maxwell. 1902.

The first of the above-named works is a classic, whose main features need really no review. Perhaps the present edition derives its principal interest from the Preface. Sir Frederick there points out that twenty-five years have passed since the first edition of this book was published; and he then summarises the position of things at that date as to the general knowledge of law. "A young writer" says he, "might well be excused at that time for setting forth with some pains things of which he had not been able to find an orderly account (at any rate in his own language) elsewhere. Now there

has been a great change in all these matters. English students may read books in English on Roman law which they can safely trust ; and we have an English Society of Comparative Legislation which publishes an excellent Journal." The present edition is a scholarly piece of work, and Mr. Potton's new index will greatly assist to render it serviceable.

Mr. Macey's work treats of a small portion only of the Law of Contract, viz., that which relates to condition of contract relating to building works. The book is a most useful summary of these conditions, which are those usually included in agreements of the kind. These agreements tend, however, to be most unfair—usually unfair to the builder, but always unfair to one party or the other. Thus clause 60 on p. 153 provides:—"In order that there shall be no dispute or difference, and that *none can arise* (*sic*) between the employer and the contractor at any time during the progress of the works or after the completion of the same, the architect shall be the sole judge of, and shall determine, all matters and questions arising on the construction of the contract, or in reference to, or arising out of, or in any way connected with the contract ; and as to the determination, abandonment, breach, or forfeiture of the contract by either of the parties : and as to the rights of the parties under the contract, and the architect's decision or valuation thereunder, made in writing, shall be conclusive, final, and binding upon both parties. The architect shall not, in making any such decision or valuation, be required in any case to hear either or both of the parties upon, nor to inquire into any of the aforesaid matters or questions : nor shall the architect act judicially or in any way as an arbitrator between the parties, but he shall act in every case solely upon his own judgment." We do not complain of Mr. Macey at all for including this cleverly-drawn clause in his book. He is providing something which his readers probably require. But could anything be more unfair ? The architect may have caused extras by his own carelessness. We have known such cases. He may have formed a prejudice against the builder from the first. We have known such cases. He may have everything to look for from the employer and nothing to expect from the builder. We have known such cases. And yet he may finally determine everything in a non-judicial way in order forsooth to prevent disputes from arising. He is not, in Mr. Macey's words, an arbitrator but a "dispute preventor." The dispute is only prevented because the builder knows that,

however unfairly he may be treated, it is useless to dispute anything! If the architect, on the other hand, be too much the friend of the builder, he may "prevent disputes" by plundering the employer. No profession consists *entirely* of honest men. Architects are no exception. No profession consists even principally of men without prejudices. Barristers or solicitors may certainly adopt Mr. Macey's forms when they are instructed to draw a contract upon these lines; for the forms are well adapted for their purpose. But we have always been surprised that master builders have not long ago combined to destroy the possibility of anything so inequitable.

Eighth Edition. *Company Precedents for use in relation to Companies subject to the Companies Acts 1862 to 1890.* Part I. By FRANCIS BEAUFORT PALMER, assisted by the Hon. CHARLES MACNAGHTEN, K.C., and FRANK EVANS. London: Stevens & Sons. 1902.

Mr. Palmer's works on Company Law are all beyond criticism. He knows more of the subject than, perhaps, any other member of the legal profession. His books have for many practical purposes been treated as being, in fact, the very law itself. It is a subject for congratulation of all concerned that this book has been brought up to date, and that the important statute 63 & 64 Vict., cap. 48—upon which Mr. Palmer has also written a separate treatise—is now considered throughout the text.

The Law of Factories and Workshops. By ALFRED H. RUEGG, K.C. and L. MOSSOP. London: Stevens & Sons. 1902.

Eighth and Ninth Editions. *The Factory Acts.* By the late ALEXANDER REDGRAVE, C.B. These editions by H. S. SCRIVENER and C. F. LLOYD. London: Butterworth & Co. 1902.

The late Mr. Redgrave was a pre-eminent master in this department of the law of England, and his work has lost nothing of its value in the hands of its present Editors. It will probably always continue to be the practice book *par excellence* on the subject. Everything required in an ordinary case will be found within its covers. At the same time the learned and much larger treatise of Messrs. Ruegg and Mossop contains a wealth of information and illustration which well justifies its extra bulk. We should prefer the larger volume if we were preparing a case for argument in the House

of Lords, but the former for every-day use in the police court. Both seem to have been brought completely up to date: and we do not think that any lawyer who had thoroughly studied either would easily come to grief through ignorance of what the statutes have provided, or what the cases upon the subject have laid down. In the ninth edition of Mr. Redgrave's book the statutory orders, special rules, and forms, have been revised by Mr. Peacock of the Home Office.

Ninth Edition. *The Principles of the Law of Evidence.* By W. M. BEST, with a collection of leading propositions by J. M. LELY. London: Sweet & Maxwell. 1902.

There is no more scholarly work among all the treatises on Evidence than that of Best. There is a philosophical breadth of treatment throughout which at once separates the work from those mere collections of authorities which take no account of the "reason why," and which arrange two apparently contradictory propositions side by side without comment or explanation. This book has always been logical throughout and artistically compiled, and now it has been brought up to date.

Thirteenth Edition. *Chitty's King's Bench Forms.* By THOMAS WILLES CHITTY, HERBERT CHITTY and P. E. VIZARD. London: Sweet & Maxwell and Stevens & Sons. 1902.

This book is most useful to the practitioner. The names upon the title-page are of themselves a sufficient guarantee that the work is lawyer-like and scholarly; and all the forms are printed in clear and legible type. It may be regarded as a kind of extra supplement to the Annual Practice; and everybody searching for forms in a hurry—and forms are so frequently required in a hurry—may be recommended to consult the work. Solicitors in particular will find it most serviceable. The one omission which we have been able to discover has regard to the question of stamps, as the only mention of stamps in the index is a reference to the form of an order for production of a document to be stamped: "See the statute 14 & 15 Vict., c. 99, sect. 6." But there must be many documents in the book—there is one on the first page—as to which the practitioner might well desire to be informed whether or not any stamp is required. The Editors, who have well and faithfully performed the work of bringing this learned volume up to date, ask in their preface

for suggestions as to any omission, and we therefore tender the foregoing. Stamps are an important part of many forms. It is true they are a form—and *something more!* but nevertheless the stamp is part of the form.

Thirty-fourth Edition. *Stone's Justices' Manual*, 1902. Edited by J. R. ROBERTS. London: Shaw & Sons. 1902.

Stone's Justices' Manual is one of the best-known books in the Law Library; and there is nothing remarkable to record about the present edition. From 1876 to 1901 the book was edited by the late Mr. Kennett. Under his guidance the proportions of the volume gradually swelled. But we do not think that it can be said that there is any waste of space: and although the present Editor hopes to render the work "more handy" in future editions, we do not think that this edition is of so "unhandy" a size as to call urgently for compression. It is no secret that in many courts throughout the land, practically no law but "Stone" is known: and it is infinitely preferable that the book, which is in so many places the whole law, should be of inconvenient bulk than that it should contain "short quantity" of information.

CONTEMPORARY FOREIGN LITERATURE.

Les Assurances sur la Vie en Droit International Privé. By GUIDO BONOLIS, Docteur en Droit, Avocat à la Cour de Florence. Translated and annotated by JULES VALERY and J. LEFORT. Paris, 1902.

Owing to the international character of life assurance, this will be a valuable handbook for the legal advisers of both assurer and assured, where any question of conflict of laws arises. In an appendix Professor Valery deals specifically with the question of the effect of war on policies of life assurance, a question up to now only treated in very scanty terms in the ordinary text-books on insurance and conflict of laws. He doubts whether *ex natura rei* recent decisions in England as to insurance of goods which have become enemy goods after the insurance was effected can apply to assurance of persons who have become alien enemies. The point awaits decision.

L'Azione in Rivocazione per Frode nel suo Concetto razionale e giuridico. By GIU. ANGELO CHIRIATTI. Velletri, 1902.

The writer's point is that the sections of the Italian Code dealing with fraud, and the remedies where it is proved to exist, are fair transcripts of the Roman and Canon law on the subject. To a large extent the work is a commentary on the *actio Pauliana*, as interpreted to meet modern requirements. The nature of such an action is, as Signor Chiriatti points out, more than a little uncertain. Some authorities call it real, others personal, others personal-real. His own opinion does not tend to clear matters. According to him it is sometimes absolute-real, sometimes relative-personal.

Il Pensiero Filosofico Giuridico nel più recente Stadio della sua Evoluzione. By GINO TRESPOLI. Parma, 1902.

This is a discussion on the view of law as a restraint on individual liberty. The effect of the modern collectivity is to tend to return to some extent to the earlier constitution of society, also collective. Consequently the restraint becomes more pronounced as the individual becomes of smaller importance. Nothing is said as to certain modern developments in the United States, which would have offered a good illustration of the tendency.

Saggio per uno Studio sulla Coscienza sociale e giuridica nei Codici religiosi. By GINO TRESPOLI. Parma, 1902.

This large and learned work received the prize of the Faculty of Jurisprudence of the Royal University of Parma. The prize was well bestowed on a treatise which is a monument of learning and research. Petrarca's phrase, *Odi Arabes eorumque poetas*, is certainly not adopted by Signor Trespoli. The point of his work is the extraction by the comparative method of the beginnings of positive law from the standard books of doctrine of the eight great religions of the East, from the Egyptian and Chinese writings to the Gospels. The religious sanction in law he proves by, *inter alia*, the importance in early procedure of the oath, the ordeal, and the combat, the latter pre-eminently the *judicium Dei*. When the facts of nature began to be explained by science and not by myth, the religious sanction *pari passu* tended to become moral and legal, and will do so more and more as society advances. The modern autonomy in their

respective spheres of law and religion will be to the advantage of both, says the learned author. United they fall, divided they stand. To those interested in the philosophy of law the work of this young jurist will be a useful supplement to that of our own great writers, such as Sir Henry Maine and Dr. Maitland. In naming some of these English writers, the author might with advantage have exercised a little more care. We know who "Loke," "Darwn," "Bickle" are, but the names would have looked better in their usual orthography.

Περὶ τῆς μοναχικῆς Ἀκτημοσύνης κ. τ. λ. By E. G. NIKOLAÏDES.
Athens, 1901.¹

The *Law Magazine and Review* seldom has occasion to notice a Greek law book. It is all the more interesting when one comes in the way of the reviewer. This book gives a very readable sketch of the legal relations of both the common and the idiorrhymic rules of monastic life in Greece, with special reference to the rights of the State and the Church over the property of those who have taken the vow of poverty. The treatment of the subject extends from the novels (*Νεαρά*) of Justinian through the report of the Committee of Seven in 1838 to recent canons of the Church and enactments of the Legislature. Some English authorities are cited in the bibliography, but it is somewhat difficult to identify them. To one not over well acquainted with Greek Canon Law the book appears to exhaust a subject which, to the English lawyer, can be of little practical value.

PERIODICALS.

Journal du Droit International Privé. 1901. Nos. xi, xii. 1902. Nos. i, ii. Paris.

English law is represented by two articles. The first is on Extradition in England, by Mr. W. F. Craies (translated by Dr. Darras). The only safe countries in Europe for an English criminal seem now to be Greece and Servia. The second is on marriage with a deceased wife's sister in England. The law and history of the

¹ The full title, as translated, runs thus, "Concerning monastic poverty in common (*i.e.*, Roman) and Greek ecclesiastical law. A historic and dogmatic research."

matter are accurately stated by Professor Mérignhac of Toulouse. An article on the *droit de renvoi* in Spain (p. 905) is interesting, as showing a practice which reminds one strongly of the Roman *responsa prudentium*. A question of succession before a Barcelona tribunal was referred to Don Juan de Dios Trias, Professor of International Law in the University of Barcelona, and judgment was delivered in accordance with his opinion. The question whether a French advocate can be heard in a Belgian Court is treated at length on p. 1070. The opinion of the writer is against the expediency of so hearing him, as he would not be subject to the usual disciplinary sanctions. The text of the French law of July 1st, 1901, relative to the contract of association, is given in full at p. 1057. One of the most useful things in this valuable periodical, the systematic bibliography of the subject during 1901, will be found at the end of the last number issued during that year.

Deutsche Juristen-Zeitung. 15 December, 1901—15 March, 1902. Berlin.

Professor Lenel's article on the liability of juristic persons for delict is interesting, in view of recent English decisions as to liability of a corporation for malicious prosecution, of a trade union for combination, &c. He sees ambiguities in s. 31 of the *Bürgerliches Gesetzbuch*, only to be solved by judicial decision. Another writer formulates an indictment of the German interrogatory system in criminal trials. Torture is applied morally, if not physically. The judge should always be the embodiment of the *nobile officium* of the law. This phrase is perhaps more familiar to those of us who practice north of the Tweed. The *Gallicismus* of some German legal writers is very pronounced. Witness such a phrase as *die Kulissen zu perhorrescieren*, which could no doubt have been cast in real German.

Rivista Moderna Politica e Letteraria. Bi-monthly. Rome.

This periodical has added the word *Moderna* to its old title, and now appears fortnightly instead of monthly, as before. At p. 143 of the mid-March number will be found a notice of Mr. Bellot's article on Usury in India, which appeared in the February number of the *Law Magazine and Review*.

La Giustizia Penale. 6 January—3 March, 1902. Rome.

Two or three cases offering some points of unusual interest may be shortly noticed. The playing of the music of the hymn of labour, though no words were sung, was held to be a seditious manifestation (p. 30). A priest, suspended *a divinis* by his ecclesiastical superior, is not guilty of the crime of abuse of public functions if he celebrate mass in his parish church (p. 190). It is not necessary, in order to constitute the crime of theft, that any profit should accrue to the thief. Therefore, it is theft to take out of another's possession a lizard with two tails, the object of the taking being to obtain the luck which in certain parts of Italy is supposed to follow the possessor of such a freak of nature (p. 259). Questions regarding possible slanders through the telephone, mistakes in contract arising from the same source, and other telephono-legal matters, are treated by Signor Farlatti Federico at p. 74.

JAMES WILLIAMS.

Received too late for notice in this issue :—*The English Reports, Vol. XVII.*

Other publications received :—*Report of the Hamburg Conference, 1900*; *Draft of International Code on Collisions at Sea* (International Maritime Committee); *The Briton's First Duty*; *Reports of the American Bar Association, Vol. 24* (The Dando Printing Co.); *Bar Examination Papers, No. 5* (Kelly Law Book Co.); *Criminal Statistics, Part I*; *The Negotiable Instruments Law* (Harvard Law Review);

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Review of Reviews, Juridical Review, Public Opinion, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Speaker, Accountants' Journal, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Virginia Law Register, American Lawyer, Albany Law Journal, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Queensland Law Journal, Law Students' Journal, Westminster Review, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer (India), South African Law Journal, Yale Law Journal, New Jersey Law Journal, Columbia Law Review, Japton Register.*

THE LAW MAGAZINE AND REVIEW.

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I.—THE ANTIENT OFFICE OF READER AND THE FUNDS OF THE INNS OF CHANCERY.

READERS of this Magazine who are interested in Legal Education will readily recall an interesting and most instructive article on "The Early History of Legal Studies," from the pen of Mr. Justice Walton, which appeared in the February issue of 1900. It is much to be regretted that the discussion of the subject has not had any practical outcome during the two years which have since elapsed. In the following pages an humble endeavour will be made to point out how it may well bear fruit, and in what way a main feature of the ancient methods of giving instruction in the law, which is now in effect obsolete, may be usefully revived, in a form suited to modern requirements, and may, with advantage, be grafted upon the modern system. It will be shown that, while the old methods had doubtless many faults, the modern ones are, in at least one respect, open to improvement. It will also be shown how funds, long disused and misapplied, may be restored to their original purposes and employed once more for the purposes of Legal Education.

On the face of the article just referred to, it is apparent that, in old times, the busy leaders of the profession of the law were mindful of Lord Bacon's apothegm, that "every man is a debtor to his profession." Guided by it, and acting

in its spirit, they readily took each his part in the education of students in the law, from the days when they themselves first attained practice and position till they ascended the Bench. In the palmy days of the profession the exacting calls of a laborious life were never accepted, as they now universally are, as being sufficient to wholly excuse from all exertion in this direction any one who could with truth put forward such a plea. The duty of thus participating in giving instruction to students of the law is shown by Mr. Justice Walton's paper to have been discharged at different stages of his professional progress by every one who attained any considerable position in the legal hierarchy. From the practice of old days, something may be learned for the improvement of the instruction given to students for the Bar at present.

Their mere academical instruction in law is, doubtless, better now than it has ever been before. The labours of Bethell, before he became Lord Chancellor Westbury, and of Sir Roundell Palmer, previously to his ascending the Woolsack as Lord Selborne, brought about the establishment by the four Inns of Court of the Council of Legal Education, under whose auspices law is taught systematically, and as a science. The learning acquired under the old system was not scientific, and was doubtless to a great extent a "thing of shreds and patches," in which mere memory played too great a part. In subsequent times the plan of reading in Chambers to a large extent corrected any mischief which might otherwise have resulted from lack of instruction in the science of law, and made most of those who obtained their teaching thus eminently practical. The present system, admirable as it is, so far as it goes, is perhaps too purely academic. It has grown far too common now for young barristers to altogether defer obtaining, till after their call to the Bar, any practical knowledge of professional work, and to then obtain it really at the

expense of early clients by, from time to time, "looking up" in some book of practice, which does not pretend to be scientific, and is only meant for reference, such information as may be at the moment required. Many a modern practitioner, it is to be feared, at any rate in his early days, "looks up" the law in much the same way as the uneducated navigator ascertains the state of the tide at any particular place at a given moment by reference to an almanac. With the aid of this useful compilation, he can give you more information of the same sort. But take away the book, and ask him to furnish you with the information merely by the aid of *data* which would be amply sufficient for a practical man, and he usually will be sadly at a loss.

The blame for this state of affairs lies with the heads of the profession. It would, indeed, be unreasonable to expect them to devote any large portion of their time to the instruction, in detail, of the students of the Inns of Court. This they never did, since the instruction given to students in old days was as a whole in truth but meagre. Nevertheless "Bolts," "Moots," and the reiteration of "Exercises," during a long course of years, insured that such knowledge as students did possess, when at last admitted to practice, should at any rate be of a useful kind, and such as would serve them in every-day life, however laboriously, and at whatever needless sacrifice of time, it had been acquired. This is not insured by anything contained at present in the modern system of Legal Education. The heads of the legal Profession, for the most part (that there are a few honourable exceptions must be allowed), are content to absolve themselves from all responsibility for taking any part in educating students, by merely saying that the subject of education has been wholly delegated to the Council of Legal Education: that the Inns furnish them with funds amply sufficient to pay able instructors whom they may select: and, that if there be anything wrong, it is the Council's business to see

to it. Apparently it has never occurred to those who speak in this strain that there is a kind of knowledge, such as a good master imparts to an apt pupil in his Chambers, which is neither to be bought nor to be found in books: and that they alone can, from their ripe experience, supplement the efforts of the Council by practical instruction.

The ancient office of Reader, in effect, furnished that instruction of a practical nature which we have seen to have been formerly possessed by everyone admitted to practice as an advocate. This it did from those early days, when, learning being mostly traditional and books but few, the Societies of Lawyers consisting wholly of ecclesiastics, the Reader was a brother monk reading to them during their meals for their instruction.¹

From the time of the institution of a secular body of lawyers, in the early days of the Plantagenets, a Reader played a great part in each of the transitions from one to another of the three degrees into which the profession of the law was then divided. First, there were the Serjeants, each addressed as "brother" by every Judge, since it was only from among their number that the Judges of the King's Courts could be selected, or Commissioners of Assize chosen. Next in order of precedence came Benchers and Readers, who then occupied substantially the same position as is now filled by holders of the comparatively modern rank of King's Counsel, which only dates from the accession of the Stuarts. Lower still in professional rank were the "Outer" or "Utter" Barristers, so called for reasons presently to be explained. Yet lower came the students or "Inner" Barristers, who derived their name from the occupation by them of places below the Bar—not because they sat within it as "Silks" do now.²

¹ Upon this subject, see more fully note A in Appendix.

² As to the origin of this division of lawyers into three classes, its continuance to the present day, and the word "Apprentice," see Note B in Appendix.

In olden times a Reader sent from the Inn tested the student of an Inn of Chancery, who aspired to become a member of an Inn of Court, by means of Exercises and Moots: Members of the Inns of Court seeking to be called to the Bar were in turn tested by Readers and Double Readers: a Barrister who had grown to be an antient, and had thus become qualified by seniority to be made one, had not only to "read" before he could be made a Bencher, but had to read a second time, and thus become what was called a Double Reader, to render him eligible to become a Serjeant. Even then, indeed, tests and examinations by the elders did not wholly cease; for, until the Revolution of 1688, no Serjeant ever took his seat as a Judge until his prospective brother Judges had examined him, and had certified the Sovereign of his fitness to fill the important position of a Judge. At the Revolution the practice necessarily ceased, since all the Judges having then vacated their offices, on a change taking place in the person of the holder of the Crown, there were none left to testify as to the qualifications of their successors. This practice still obtains in Scotland; while as to the results of its discontinuance in England, and the creation of Serjeants who were about to be made Judges, having become merely colourable, see Note C in Appendix.

The parts played by each of the three classes of Readers just mentioned, viz.: (1) Readers sent by their Inns of Court to the dependent Inns of Chancery; (2) Single Readers; and (3) Double Readers; may now be considered in detail.

A learner of the craft of the law had, like the learners of other crafts, to start from the very "*officiæ*" or workshops of the Courts.

All actions were formerly commenced by "Original Writ." In the framing of these, considerable skill was required. The Attorneys used to prepare such writs, and

to afterwards "sue them out" on behalf of their clients. When there was no precedent, a new writ had to be framed on the analogy of the old ones. An intimate knowledge of precedents was, therefore, essential. Very early in the history of English law, and about the time when native English secular lawyers took the places of the ecclesiastics, who formerly acted solely as professional lawyers, the Attorneys formed themselves into "Inns," or "Societies," just as their professional superiors at the Bar had formed themselves into "Inns of Court." The Attorneys' Inns were called "Inns of Chancery," because the original writs just mentioned used all to be issued "out of the Chancery." It was to one of these that a beginner in the law betook himself, to there learn from the Attorneys the very elements of the profession, and to render himself familiar with the many precedents of original writs, by copying them over and over again. Each Inn of Chancery was annexed as it were to one of the four Inns of Court, and served as a kind of preparatory school for the latter.¹ Even when the proficiency of a student enabled him to join an Inn of Court, and he had obtained the nomination of a Benchet to one (which was always required), entrance into an Inn of Court was the occasion of a heavy "fine"—was not the mere matter of course, accompanied by the payment of a comparatively small fee, which it has since become. That a student before coming to an Inn of Court should pass through an Inn of Chancery, was secured by a far heavier fine on entrance being imposed on one who had not done so. Indeed, even on payment of the heavier

¹ While every Inn of Chancery was connected with an Inn of Court, though there is no actual evidence proving it, there is ground to suspect that each of the Inns of Court outside the Temple, like the Inns of Chancery, was in some way connected with, and perhaps sprung from, one of the older Law Societies in the Temple. At all events a close alliance, never yet explained, undoubtedly existed between the Middle Temple and Lincoln's Inn, and between the Inner Temple and Gray's Inn.

fine, it appears to have been a matter of especial grace and favour at the instance of some Benchler to allow such a student to enter at all.

A test by means of a Moot, conducted by the Reader sent by the Inn of Court to the Inn of Chancery,¹ and to gain distinction at such a Moot, was required from the student at the Inn of Chancery before he could be admitted to an Inn of Court. An interesting entry in the diary of Sir Symmonds D'Ewes set out in note D of the Appendix affords an instance of this.

The practice that a law student should pass through one of the Inns of Chancery before entering an Inn of Court continued down to the time of the Great Rebellion.² After the Restoration, however, and early in the 17th century, "Readings had become totally laid aside," as we are told by Sir John Bramston.

* The period passed by a student in an Inn of Chancery was by no means unprofitable to him. So far as mere time was concerned, four of the Terms spent there might be reckoned as Terms kept at the Inn of Court which he eventually joined. His instruction in the law there, was, moreover, not entirely confined to copying precedents. While at the Inn of Chancery, he acquired familiarity with legal principles by discussion of points of law with his instructors, and with his fellow students in "Moots" and "Bolts." In passing, it may be useful to explain that a "Moot" in an Inn of Chancery was the argument by the students there of a case put by the Reader sent from the Inn of Court.³ A "Bolt," on the other

¹ Dugdale gives a detailed account of the sending of a Reader by the Middle Temple to its dependent Inn of Chancery—New Inn.

² See two interesting late examples of this in the case of Sir Matthew Hall and Sir Symmonds D'Ewes, mentioned at some length in Note D of Appendix.

³ The method of holding a Moot is described in the Report to Henry VIII, cited by Mr. Justice Walton, and is also set out in Douthwaite's *Gray's Inn*, at p. 31, copying Waterhouse's *Commentary upon Fortescue's de Laudibus*, p. 542.

hand, was the proper term¹ applied (especially at Gray's Inn) to the private arguing of cases which used to take place before an Ancient and two Utter Barristers as Judges. A "Bolt" was usually held in the library of the Inn² and was conducted as follows: three students each proposed a case: those presiding as judges selected one of these for argument; the students first argued it, then the Utter Barristers did so, and finally those presiding delivered their opinions. On arriving at the Inn of Court, to which his abilities had procured admission for him, the student discovered that the floor of its Hall was divided into three parts. At its upper end a raised dais, on which the Benchers stood, occupied about a third of the available space. The remaining two-thirds of it were divided in the middle by a "Barre" extending as far as the wall on either side. Close inside this Barre, between it and the dais and close to the latter, the "Outer" (corrupted into Utter) Barristers sat on forms. Just below the dais, probably (though its exact position is hard to determine), stood a cupboard, which may have served, during dinner, for the use alike of the Benchers, as well as for that of the "Antients" or "Cupboard Men," and possibly the Outer Barristers.

The student discovered, too, from the position in which he was now placed, that his Inn of Chancery was regarded as being, as it were, a mere enlargement of the part of the floor between the door and the Inner Barristers or Mootmen who stood close up to the Barre itself. It was this that entitled him to count four of the Terms which he had

¹ In even standard dictionaries it is merely said that "Bolt" is derived from "Bolt," a house, without further explanation. The word "Bolt" was originally the term applied to the operation by which a good housewife passed her flour or meal through the coarse meshes of a bag. Accordingly, as a legal term, "Bolt" meant the thorough sifting and examination of a case by discussion.

² This is to be gathered from an order made in 1631 at Gray's Inn, which is still extant, directing the Butler to attend the Antients and Barristers that sat at the case in the Library, and to enter in a book the names of those taking part in it.

passed in the Inn of Chancery as having been "kept" at the Inn of Court. The fact that he was entitled to do this must be borne in mind when mention is made of the long period of time during which a student was formerly required to keep terms previously to being called to the Bar.

The student continued to take part in Moots at the Inn of Court just as he had previously done at the Inn of Chancery whence he came. In due course, and when he attained proficiency, he reached the position of a Moot-man or Inner Barrister—a term which in those days described a student in an advanced position who had not yet attained the rank of a barrister, and not, as it has come to mean in modern times, those barristers who have obtained precedence, and have accordingly been called within the Bar of the King's Courts.

The comprehensive name for arguments in the Inns of Court, however conducted, was that of "Exercises." These "Exercises" consisted of "Moots" and "Grand Moots." At an ordinary Moot in an Inn of Court, the Reader for the Term and two Benchers presided as Judges: an Inner Barrister or Moot-man (in other words, a senior student) propounded a case: another Inner Barrister answered him: then one Outer Barrister on each side argued it, and finally it was decided by the presiding Reader and Benchers. The "Grand Moots" were Moots similarly conducted, held immediately after the Grand Readings in Lent and in August respectively, presided over by the Judges visiting the Inn, and such of the Benchers as chose to give their attendance.

After passing a period of studentship during eight years (at one period it was even made ten years), and having attained the position of an Inner Barrister or Moot-man, the student might hope to be called to the Barre of his Inn. One thus called to be an Inner Barrister at the Barre of his Inn in due time took his share in the education of

the junior students, and might hope to be now called to the Bar of the King's Courts. For he was sent by his Inn of Court as a Reader to one of his Inns of Chancery. He was not till then sent to "read abroad," as it was called—that is to say, to read at one of the Inns of Chancery attached to his Inn, and to bring back from thence the most promising of the students there to recruit the number of those in the Inn of Court. When he had been so sent he became qualified to be called to the Bar of the King's Courts of Justice. Anciently, it will be seen, a call to the Barre of an Inn of Court was not immediately followed by a call to the Bar in the King's Courts at Westminster Hall. In these modern days, indeed, the interval between one of these and the other is usually less than twenty-four hours. But in old times a period of five years intervened, during which the Inner Barrister had to continue his "Exercises."

After a further interval, which was usually at least five years, that is to say, when he came to be of about 15 or 16 years' standing, the Utter Barrister was called to the "Cupboard." We learn from Dugdale that there were anciently four Cupboard men in each house, and the same authority tells us that these four were "the antientest barristers in the House." It cannot now be exactly traced what the ceremony of being "called to the Cupboard" was, or what were the precise duties of those who had been so called. We, however, know that the Readers of an Inn of Court were selected from amongst the Cupboard men, and that one who had been made a "Cupboard man" usually became a Reader within about two years afterwards. We are told, too, that the Benchers were not "tyed" to elect the senior Cupboard man to be Reader. Those Cupboard men who might have been called upon to become Readers, but had not been chosen for that post, continued to be styled "Antients."

Two Readers were chosen in each year—one to read in

the Vacation following Hilary Term—that is in Lent—and the other to read in the Long Vacation after Trinity Term—that is at Lammas-Tide. The Reader selected to “read,” as August or Lammas reader, was usually¹ one chosen from among the Cupboard men to then give his first reading. From the fact that he was doing so he was called a Single Reader. The Reader selected to “read” in Lent was usually¹ one who had read before. He was for this reason called a Double Reader.

A “Reading” consisted of a course of Lectures accompanied by a feast. The Lent Reader’s feast commenced on the Feast of the Purification of the Blessed Virgin: that of the Lammas Reader began on the Monday following the first Sunday after Lammas Day.

The formalities observed at a Reading were apparently much the same whether the Reader were a Single Reader or a Double Reader. Every Reader, after he had been elected, went into retirement for a time. After this he appeared at the Temple Church on the afternoon of the Sunday immediately before his reading being commenced. The Sunday on which the Lent Reader thus appeared was the first Sunday in what was called “Clean Lent”: *i. e.*, that immediately preceding the Feast of the Annunciation (Lady Day). The Sunday on which the Lammas Reader so appeared at church was the Sunday immediately following Lammas Day. He, in either case, attended next morning at the Hall of his Inn, and there took the Oaths of Supremacy and Allegiance. This done, he selected a Sub-Reader to carry his books and otherwise assist him:

¹ The celebrated Plowden, during whose three years’ Treasurership the existing Middle Temple Hall was erected in 1570, was “Single Reader” or “Lent Reader” in 1537, and was “Double Reader” (*i. e.*, read a second time) in August, 1560. This shows that the rule for a Single Reader to read in August and a Double Reader in Lent was not inflexible, and could be varied to meet the personal and professional convenience of the Readers.

and such Sub-Reader then read out the title of the Statute on which the Reader had elected to read.

A "Reading" always consisted of a Commentary on some Statute. Coke, in the preface to Part III of his Reports, describes the old Readings thus:—

"First, they declared what the Common Law was before the making of the Statute; secondly, they opened the true sense and manner of the Statute; thirdly, their cases were brief, being at most one point at the Common Law, and one upon the Statute; fourthly, plain and perspicuous, for the honour of the Reader to excell others in authorities, arguments, and reasons for proof of his opinion, and for confutation of the argument against it; fifthly, they read to suppress subtle inventions to creep out of the Statute."

Dugdale tells us the contents of a Reading somewhat fully. He says:—

"The Reader begins with a grave speech, excuses his own weakness with desire of their favourable censures and concludes with the reasons wherefore he made choice of that Statute. Then he declares unto them his divisions made upon the Statute which are more or fewer as he pleaseth; and then puts ten or twelve cases on his first division: of the which the puisne cupboard-man makes choice of one to argue and in his argument endeavours, what in him lyes to oppose the Reader's conclusion. After him follow the rest of the cupboard-men standing at the cupboard; then the Benchers, who are placed on a form opposite the Reader argue in their turns; and last of all the Reader himself, who maintains his own conclusion; and often times such Judges or Serjeants of the Law who are of the Society come to argue the Reader's case; and they at such time come always in their purple robes and scarlet hoods and are placed on a form opposite to the Benchers with their backs to the Reader."

A list of the various known Readings will be found in Pearce's *Inns of Courts*, at pp. 66–9. Among the more celebrated were Lyttelton on the Statute *De Donis*; Stamford on the Royal Prerogative; Callis on Sewers; Bacon on the Statute of Uses; and Risdon on Forcible Entry.

The provision that Readers should expound the Statute law was wise. The principles of the Common law are so well known that they rarely give rise to litigation. The construction of Statutes together with cases as to the construction of various private documents, is the subject of the great majority of the decisions of the Courts. About nine-tenths of the reported cases are on these subjects. Indeed,

in some volumes of Reports, about six-sevenths of the cases reported turn on the construction of Statutes alone.

A Double Reader had the privilege of calling several Moot-men or Inner Barristers to the Bar of the King's Courts. The number which he was allowed to call varied at different Inns. In 34 Elizabeth a certain Mr. "Ellys," a Reader at Gray's Inn, was ammerced 20 nobles for his callinge of eyght utter barristers, whereas by the rules of that house he ought to have called but four. In 6 James I the number of four was thought to be too large, and was reduced to two, each of whom was required to be of at least seven years' standing. At all the Inns, however, the privilege of calling to the Bar originally belonged solely to the Reader, who only called the most proficient amongst the students attending his reading. Subsequently, the Reader and the Benchers each called a certain number. Finally, after the Restoration, in 1664, an Order of the Lord Chancellor and Judges altogether took away from the Readers the privilege of calling to the Bar of the King's Courts, which since that time has been accordingly exercised solely by the Benchers of each Inn.

The Reader's feast played a considerable part in the Readings. Both at this and at the Reader's election, dancing, and "A Wooden Bowl filled with Hypocras" were conspicuous. At the Reader's Feast the students "carried up the meat to the Reader's table." They formerly did this on various occasions; but in later times the function was reduced to four times a year, namely, at the two Readers' feasts, on All Saints' Day, and on the Feast of the Purification of Our Lady, otherwise Lady Day. On these occasions the panier (or waiter) came "with addition of one dish extra ordinary to every mess." This practice is recorded by Dugdale and maintained to this day at Readers' Feasts in the Middle Temple Hall.

After the Reader's Feast was concluded, "Exercises"

followed. To hold these after dinner was, as we have seen, a common practice in the Inns of Court. The students having been got together by the attraction of a good dinner, advantage was taken of their presence having been secured to lock the doors and to deliver to them a Reading. It is thus that the custom of locking the doors during dinner, which still prevails in every Inn of Court, is explained, and this, too, tells the reason why it is required that a student eat a certain number of dinners in each term before he can be credited with having "kept" sufficient terms to entitle him to be called to the Bar. His having done this was, in old days, a practical guarantee that he had attended a certain number of Readings or Law Lectures.

The course of events at the Reading, which has just been described, was repeated on the Monday, Wednesday, and Friday in each week, during the continuance of the ceremony; the intermediate days during the period were "spent in feasting and entertainment to strangers who are commonly great lords, and other eminent persons. But be the guests of never so high degree, the Reader within the Precincts of the House hath precedence of them." Even the Master of the Temple, of whom we are told that in those days "he usually hath his dyet in either house at the end of the Benchers' table," and who "in either House" displaced the Treasurer on any other occasion when he might chance to come, did not enjoy the privilege of sitting at the head of the table "in the time of reading." The Reader during that period maintained his place at the head of the table, even when the Master of the Temple was present.

The Reading, with the accompanying Feasts provided by the Reader, lasted on each occasion for three weeks and three days. At the end of this period there followed "a great and costly feast provided for the entertainment of Foreign Ambassadors, Earls, Lords, and persons of eminent quality, which though it be called the Reader's Feast yet he

bears no part of the 'chardge,' the same being imposed on four gentlemen of the house whom they call Stewards of the Feasts," and by order 34 Eliz., these "were to be at no further charge than five pounds a man."

On the morning following this last feast a breakfast took place, at which there were yet more ceremonies and set speeches. After this the Reader started for his home in the country, with a crowd of friends and admirers accompanying him in procession. These only parted from him when he had accomplished his first day's journey. Even then the ceremonies connected with the Reading were not entirely completed. On the first day of the next following Term there were more speeches and a supper. The Reader, after this, we are told, became "an absolute and Confirmed Bencher."

In return for the great expenses incurred by them, Readers thus developed into Benchers received some privileges and advance in professional position.

The first of these was that, as has been seen, on the ceremony of reading being concluded, the Reader had the right to call to the Bar the most distinguished of the senior students who had taken part in the discussion following his Reading.

All Benchers, too, wore a special gown or long robe differing from that of other Barristers. It appears that "a Bencher wore a gown faced with jemitt fur."

Moreover, the names of Double Readers were, by an Order made in Queen Elizabeth's reign, expressly required to be given to the Judges, "who have promised to give them precedency of hearing after Serjeants and Her Majesty's learned Counsel," by which latter phrase was meant (there being no Queen's Counsel at that date) next after the Queen's Attorney or Solicitor-General.

The most valuable privilege obtained by serving the office of Reader and thus becoming a Bencher was, however, that

Serjeants-at-Law were, in practice, always chosen from the Double Readers, and, by Statute, the Judges could only be selected from the Serjeants. In theory, the Crown could appoint any one to be a Serjeant, and any Serjeant could be made a Judge. The practice, however, was that the writs creating Serjeants-at-Law were always issued on the advice of the Judges of the Common Pleas, and only included the names of those Double Readers whom they considered to be worthy of promotion.

Benchers, too, possessed many minor privileges in connection with the Inn of Court to which they belonged. These will be found enumerated by Dugdale. Amongst them was one permitting the son of a Bencher to be admitted as a student without paying any fine, and another conferring on a Bencher the privilege of nominating to a certain number of other admittances at a reduced fine.

The Readings and the course of Legal Education embodied in them gradually fell into disuse one after another.

First, as we have already seen, the practice of passing through an Inn of Chancery previously to entering an Inn of Court became disused after the Restoration. Its place was taken by the excellent practice for a young man to read in Chambers, as the pupil of some eminent member of the Junior Bar, which continued to be almost universal till within the last few years. The instruction thus given was an admirable combination of theory and practice, and much more was learned from the teaching of a master eminent in his profession—such as a great Conveyancer or a great Pleader—than could be picked up in an Inn of Chancery from much copying of writs, supplemented by discussions at “Moots” and “Bolts.” When this teaching was preceded by a period spent in a solicitor’s office, as it often was, it was even more excellent. The system of reading in Chambers has, on the one hand, produced some of the greatest lawyers the country has ever seen. On the

other hand, the excellence of the teaching thus obtained unfortunately rendered the Inns of Court less diligent in imparting any real instruction in Law. Thus it happened, as we shall see presently, that the office of Reader was either abolished altogether, as it has been at Lincoln's Inn and at Gray's Inn, or was allowed to become a mere formal and sinecure office, in which form it has survived at the Middle and Inner Temples.

In addition to this, the vast expense which it entailed, was undoubtedly a great cause leading to the abolition of the practice of Reading. The cost of practically keeping open house to everyone on three days a week, during three weeks and three days, was attended with enormous expense. Dugdale tells us this, and adds that "some have spent over six hundred pounds¹ in two days less than a fortnight," and in many passages reiterates remarks as to the vast expense. The extravagant feasting which prevailed during these Feasts, for which the Reader himself paid, was not even confined to the Hall itself. For we learn from the authority just mentioned that at least "one brace of buck" was usually sent to New Inn "to feast the Students there," and also that "the neighbour parishes to the Temple do also taste the Reader's bounty."

This enormous expense naturally made men reluctant to take upon themselves the office of Reader, and the old records of the Inns betray the existence of difficulties in filling it. At one time the Benchers fined any one who refused to take the office of Reader and remitted him to the Utter Bar. At other times stringent orders were issued in the nature of sumptuary legislation. It was by Order declared what amount the Reader should be at liberty to spend, and how much should be the contribution of the House toward the expenses of the Final Readers' Feast given by it.

¹ Equivalent to about £5,000 now.

The two great causes just mentioned, namely, the fact that as a means of instruction they had become practically useless because students were better taught by a course of reading in Chambers, and the further fact that they had grown to require a most extravagant expenditure on the part of those who held them—caused Readings to become obsolete so far as regards any active duties.

The time appears, however, to have now arrived when the office may be again made to perform a very useful part. The excellence of the instruction afforded, by the teaching given under the superintendence of the Council of Legal Education, unfortunately now tempts many—if not the majority—of the most promising young men who come to the Bar to do so without any previous instruction in Chambers in the practical work of the Profession. The results of this have been stated on an earlier page, it is hoped, without either exaggeration or needlessly severe criticism. Young men coming to the Bar always avail themselves with avidity of such instruction as their Inns of Court afford to them. The heads of the Profession who bear rule in the Inns ought to remedy the great defect in the teaching now given, and to render it as practical as it is already academically excellent. The work of the tutors under the Council of Legal Education is admirably performed, so far as regards the scientific and academic theory of the Law. They, however, are for the most part of necessity men who are not in much active practice; indeed, the very nature of their duties forbids that they should be so. Those appointed to be Readers are, however, with but few exceptions, men who have either attained a judicial or semi-judicial position, or who have at any rate become eminent in that special branch of the Profession to which they have attached themselves. They are, therefore, specially qualified to give young men who are about to be called some of that practical instruction which is the result of experience.

Let, then, the office of Reader be revived in a modified form. Let each Bench, as it falls to his turn to be Reader, give a course of lectures (say a lecture once or twice a week during the three weeks of term) to the younger men of the Inn. Let these Readings, like those of old upon new Statutes, always teach some of the many things which are not to be found in books: and, indeed, let it be understood that mere book knowledge must not form part of a Reading. It is difficult for hints from the Judicial Bench, or from his more experienced Leader, to be given to a young advocate, as to the practical conduct of his cases, without some seeming unkindness, or a suggestion of incapacity on his part being conveyed. Nor can a Pleader or Conveyancer of eminence offer such hints to Counsel on the other side without being thought guilty of impertinence, or of intending to convey some such suggestion as that previously mentioned. Many a useful hint, and much of that teaching which experience gives, might however be conveyed in a friendly lecture, by a Reader possessing special qualifications on the subject as to which he "read." For example, an occupant of the Bench, or a Leader of experience, might, in a lecture, instruct future Barristers to avoid some few of those mistakes which he is accustomed to see young advocates frequently fall into. Thus he might warn them against the common error of apparently supposing that cross-examination is a phrase in which the word "cross" must be literally construed, and taken as meaning that questioner and witness necessarily become mutually and noisily angry and offensive to one another: he might tell them that it is not a judicious cross-examination to ask a witness to repeat anything favourable to the other side that he may already have said during examination-in-chief, and thus offer him an opportunity of qualifying or contradicting it: he might instruct them never to forget that "cross-examination is a two-edged sword,"

and that an injudicious question may be made the occasion for volunteering matters that could not be stated in evidence during the examination-in-chief, and may bring upon the questioner an answer which proves an avalanche that overwhelms him; and he might, too, remind them that cross-examination, like examination-in-chief, should always have a definite object, and when it has not, it is not only dangerous to the questioner, but at best a sheer waste of the Court's time. They might also be told that a judicious re-examination does not consist of a repetition and summing up of all the things in favour of his own side, which the witness has already said during cross-examination, for apart from the waste of time, the witness may be led to suppose that he is wanted to qualify or alter his previous statements, and be unfortunately made to do so. While an occupant of the judicial Bench, or a great *Nisi Prius* Leader, might usefully give hints such as these, a consummate Conveyancer or an experienced Pleader might well warn his hearers against making in practice some of those mistakes which long experience has taught him are most frequently made by beginners in his branch of Practice. In short, the Readings should be an attempt to impart some of the teachings of experience, and to, as far as possible, place old heads on young shoulders.

The eminently practical Americans have already taken action in the direction suggested above. In the last number of this Review, Doctor Williams refers to the differences in the methods of studying Law at the English Universities and at the Law school at Yale University. He remarks, "We¹ have in England very rarely, if at all, any one who is engaged in active professional or judicial work filling the place of an academic teacher. This is by no means unusual in America. At Yale, for instance, the Hon. Simeon E. Baldwin, a Judge of the Supreme Court of Errors of

¹ *Ante*, p. 254.

Connecticut, is Professor of Constitutional and Private International Law, and Mr. Thatcher, one of the Leaders of the New York Bar, is Lecturer on Corporate Trusts. The effect of this is, no doubt, to bring the students more into touch with actual Practice."

Not only do many of our Judges take such an interest in Legal Education, that they would be readily prevailed on to preside, as of old, at "Grand Moots," that might follow after Readings given by Readers with whom they are intimate; but men eminent in their several branches of the Profession would, without difficulty, be found to assist in these Moots. At the end of each course of lectures a mock trial, a mock Parliamentary inquiry, or a mock draft, might test, in a Moot, the practical proficiency of the students in the subjects of which each lecturer had been treating. A slight alteration in the Consolidated Regulations of the Four Inns of Court would enable the Inns to give prizes at each competition, which would enable the winners to read in Chambers as pupils for a period of (say) six months.

The moment for the Inns to establish some such system of practical domestic instruction for their students, as has been just suggested, is most opportune. The last two Inns of Chancery in which, of old, future Barristers learned the practical side of their work, and many of its elementary details, are on the eve of disappearing. The Court of Appeal (affirming, without hesitation, a like decision by Cozens Hardy, J.) has declared that the funds of Clifford's Inn are, in the broad legal sense of that word, a "charity" applicable to the purposes of Legal Education. Moreover, New Inn, where, within the memory of many men still living, attendance at a "New Inn Exercise" materially lessened the fees (a remnant of the "fines" of old days) which a student in the Middle Temple had to pay on call to the Bar, is about to be sold by the Society to which it had been leased by the Middle Temple. It can hardly be

doubted that the funds of the Society of New Inn are held on trust for the purposes of Legal Education, no less distinctly than those of Clifford's Inn, and only for the purposes of a Society in some way connected with the Law.

The decision that the funds of these old Inns of Chancery are impressed with Trusts will, unless the Inns of Court exert themselves, be doubtless followed by a suggestion that a new Scheme for the administration of these funds shall be framed by the Charity Commissioners and sanctioned by the Court of Chancery. In that event there will be a danger lest they be diverted from their original purpose, of serving as adjuncts to the system of Legal Education provided by the Inns of Court. There is, however, nothing whatever which prevents these Inns of Chancery being both carried on as in old time. Subject to the rights of the "Antients," to Commons and to Chambers, the funds derived alike by the Societies which occupied the various Inns of Chancery and by the various Inns of Court to which those Societies were attached, might, by the mutual consent of all interested in them, be well employed in providing fees to be given as prizes to the most distinguished student already qualified to be called to the Bar at the Moot following each of the revived Readings. The funds of New Inn, formerly the property of the Middle Temple, are at present not dealt with; nor has any decision yet been come to as to what shall be done with the surplus funds of Clifford's Inn—which was formerly subject to the Visitorship of the Inner Temple. Lincoln's Inn is doubtless still in possession of the large funds which arose from the sale of the Inn formerly owned by it. Gray's Inn, too, would probably have no difficulty in producing those obtained on the sale of Staple Inn. All four Inns of Court might unite with the Societies of the old Inns of Chancery, and with the Incorporated Law Society, in the common object that the bodies named should together

concert a scheme whereby "Pupilage" scholarships might be founded with the funds respectively by them derived from the old Inns of Chancery. Similarly, the rights and interests of Solicitors might be recognized by one or two of such scholarships being placed at the disposal of the Incorporated Law Society, for distribution among the junior members of their branch of the Profession. The pupillage fees thus awarded as prizes might be paid to a junior member of the Inn bestowing it selected by the Benchers of that Inn; or, in the case of scholarships awarded by the Incorporated Law Society, selected by that body.

Places set apart for the study of the law are, we are told, intended to provide that a due supply of fit persons qualified to serve the State as Lawyers may never be wanting. The restitution of the funds of the Inns of Chancery to Legal Education, and the restoration of active duties to the ancient office of Reader, would profit alike the students and the Junior Barristers of the Inn to which the funds were attached; the standard of the Junior Bar and the younger generation of Solicitors would be considerably raised, and the public would thus, in the end, benefit.

G. PITT-LEWIS.

APPENDIX.

Note A.

There is abundant evidence that in old times the Lord Chancellor, the Judges of the King's Courts and the whole of their officers, were ecclesiastics. Down to a comparatively late period in our history the Lord Chancellor continued to be an ecclesiastic. To take but a single example of the

Judges having been usually ecclesiastics, we find that no less than ten of them in the reign of Henry II were connected as Canons or otherwise with St. Paul's Cathedral. The officers of the Courts of Law were required to be ecclesiastics, and as such could not marry, until, just before the Reformation (namely in 1422), a statute (8 Hen. VIII, c. 8) enabled them so to do. John Croke, one of the six Clerks in Chancery, the grandfather of the famous George Croke the reporter, was amongst the first to avail himself of the privilege.

Ecclesiastics ceased to practise as advocates in the English Law Courts about the middle of the thirteenth century. The fourth Council of Lateran (1216) forbade clergy to practise in or enter the Law Courts. An express prohibition against their doing so in English Courts was made by the Bishops, and finally by a Bull of Pope Innocent in 1254, extending alike to English, Scotch, and Welsh Courts, and in the following terms: "*Innocentius . . . &c.; Præterea cum in Angliæ, Scotiæ, Walliæ regnis, causæ laicorum non imperatoriis legibus, sed laicorum consuetudinibus decidentur, fratrum nostrorum, et aliorum religiosorum concilio et rogatu, statuimus quod in prædictis regnis leges sæculares de ætero non legantur.*" (Matt. Par., p. d. 883, ann. 1254, et in additamentis, p. 191.)

Note B.

Three classes of practitioners of the law existed very early. An assessment for a subsidy made in 1379 (3 Rot. Parl. 2, Rich. II) shows that there were then "Great Apprentices," *i.e.*, Serjeants and Judges; also "Apprentices practising," *i.e.*, Barristers; and further, "Apprentices of less estate," *i.e.*, Attorneys and Students. In very early days Serjeants were the only advocates. Their "apprentices," however, subsequently obtained a right of audience in Courts other than

the Common Pleas, in which the Serjeants enjoyed the sole right of audience till the commencement of the reign of the late Queen Victoria. Thus it was that the term "Apprentice" long continued the proper term for a Barrister. As late as the time (*circa* 1570) of Plowden (Middle Temple) and of Finch (Inner Temple), each of these sages of the law used this word as that affording a proper description of himself and his professional work. Chaucer's contemporary, Gower, in his *Vox Clamantis* (recording Wat Tyler's rising in 1383, written in Elegiac Latin verse to hide from the objects of them sharp censures on knights, burghers and cultivators), employs the term when, in a few pregnant words, he sums up a Barrister's whole career in the lines—

*"Et apprenticius, sergandus post et adultus,
Judicis officium fine notabit eum."*

• Coke, nearly three centuries later, makes substantially the same distribution as was contained in the Subsidy Roll of Rich. II. He divides Professors of the Law into (1) Mootmen, or Students; (2) Utter Barristers, amongst whom "Antients," who are also named by him elsewhere, would certainly be included; and (3) a class corresponding to the "Greater Apprentices" of the old Record, and consisting of Readers and Double Readers, or in other words Benchers and Serjeants, of whom the latter might be either (a) Serjeants-at-Law, (b) King's Serjeants, or (c) Judges.

Approximately, the division of the Profession into several classes, which was made in the Subsidy Roll of Rich. II in the fourteenth, and by Coke in the seventeenth century, still exists as follows:—(1) "Greater Apprentices," that is (a) the Judges; (b) the King's Counsel and the Benchers of the Inns of Court; (2) "Apprentices practising," *i.e.*, Barristers; and (3) "Lesser Apprentices," consisting of solicitors and students of both branches of the legal Profession.

Note C.

In Scotland the practice that a newly-appointed Judge shall undergo an examination, before actually taking his seat on the Bench, still prevails. There, a new Judge is at first a "Lord Probationer." He sits, without robes, with one of the Lords Ordinary, and hears a case tried by the latter in the "Outer House." He then reports to the Judges in the "Inner House" as to this case: and it is not till after they have approved of this report that the Lord Probationer becomes a Lord Ordinary.

In England, the omission of this examination, together with the appointment of a barrister, about to be created Judge, to the office of Serjeant being reduced to a mere formality, in order to supply a colourable compliance with the statute (13 Edw. I, c. 3; amended by 14 Edw. III, c. 16) requiring that none but Serjeants shall be made Judges, has perhaps led to the occupation of the Bench by some to whose learning their brethren might not have been altogether prepared to previously testify.

Note D.

The practice of studying at an Inn of Chancery, before entering an Inn of Court, was in full vigour in the days of Sir Matthew Hale, who was a notable exception to the rule that a law student usually entered an Inn of Chancery annexed to the Inn of Court which he eventually joined. Sir Matthew's father and grandfather were both members of Lincoln's Inn. Nevertheless he became himself a student of New Inn, which at that time was an Inn of Chancery, and indeed the only one, attached to the Middle Temple. Possibly the close alliance (mentioned in the note in the text) which in old days existed between the Middle Temple and Lincoln's Inn may in some way explain Hale's

entering the Inn of Chancery attached to the former. Another well-known instance of a law student who, before the Great Rebellion, passed through an Inn of Chancery, is that of Sir Symmonds D'Ewes, who was called to the Bar in 1623. It is recorded by Sir Symmonds in his Diary that he was a student of New Inn: that he frequently took part in the Moots there: and that he and another distinguished themselves at a Moot held on 18th November, 1622, on the occasion of the Middle Temple sending a Reader to bring away from that Inn of Chancery some of the more promising Students, when both were then removed to that Inn of Court.

II.—CRIMINAL STATISTICS, 1900.¹

ONE cannot open the Criminal Statistics for 1900 without a sense of disappointment at the brevity of the Introduction. It is an admirably clear and lucid summary of the principal figures, with notes on a few of the more important points suggested by them; but in recent years the Editors of the statistics have so accustomed us to introductions containing historical matter and detailed analyses of such importance and value that the present comparatively unpretending effort cannot fail to occasion disappointment. The Editor for 1900 (Mr. C. E. Troup C.B., of the Home Office) explains that the preparation of materials for the exceptionally full and interesting introduction to the 1899 Statistics (to which attention was drawn in the May number of the *Law Magazine*) necessarily delayed their publication, and it was therefore thought better to issue the 1900 figures at once, with a comparatively slight introduction, in order to keep the series from falling too far into arrear.

¹ *Judicial Statistics, England and Wales, 1900.* Part I.—Criminal Statistics. London: Eyre and Spottiswoode.

The year 1899 was remarkable for the small amount of crime committed. The number of crimes known to the police was 76,025, a drop of 6,400 as compared with 1898, and of more than 3,000 as compared with the average of the years 1894-9. The number of persons for trial at Assizes and Quarter Sessions was 10,902 (a drop of 500 since 1898), and the number of persons tried summarily for indictable offences was 44,463, or a fall of nearly 2,000. There were, however, special reasons for this reduction; 1899 was a year of prosperity and high wages, and the mobilisation of militia consequent upon the Transvaal war at once provided employment for men likely to be driven into crime by the pressure of want, and removed a certain number of bad characters.

These conditions persisted in 1900, and it is not surprising therefore to find that the amount of crime still continues small. The number of crimes reported to the police was 77,934. This is a rise of 1,909; but the number is still 800 below the average for the years 1896-1900, and close on 5,000 below the average for 1891-5. The number of persons tried on indictment was 10,149. This is 750 below the figure for 1899, and 800 below the average for 1896-1900. It marks the lowest point of a continuous diminution: the average for 1881-5 was 14,460, while for 1896-1900 it is 10,964.

The number of persons tried summarily for indictable offences shows an increase from 39,592 in 1899 to 43,479 in 1900. This figure is higher than the average (40,648) for the five years 1896-1900, but it represents merely a slight check in a steady diminution. This comes out very plainly when it is compared with the averages for previous quinquennial periods. For the years 1881-5 the average is 45,682; for 1886-90 it is 43,759; and for 1891-5, 43,455.

This increase is of great interest, as a very large proportion of it is due, as the Editor points out, to a definite and easily traceable cause—the operation of the Summary Jurisdiction

Act 1899. This Act empowered Justices to try summarily the offences of obtaining money or goods by false pretences, and of setting fire to commons and plantations; it also enabled offenders up to 16 years of age to be tried summarily for all offences except homicide (the age limit had previously been 12). This Act came into operation in the middle of 1899, and its effect will therefore be seen by comparing the figures for 1898 with those for 1900.

The number of cases of obtaining by false pretences tried at Assizes and Sessions has fallen from 890 in 1898 to 394 in 1900, the cases of setting fire to crops have fallen from 17 to 5, and the number of young persons convicted at Assizes and Sessions has been reduced from 252 to 120—a diminution of 630 in all. In 1900 there was an increase of 2,409 in indictable offences tried summarily, as compared with 1898; and the operation of the Act of 1899 accounts for 1,305 of this increase. The number of persons tried summarily for obtaining by false pretences increased from 3 in 1898 to 1,041 in 1900: the cases of setting fire to commons, &c., increased from 1 to 10; and the number of persons between 12 and 16 convicted summarily in 1900 (for offences other than false pretences) was 258.

The Editor points out that the increase in summary cases is rather more than double the decrease in cases of the same nature at Assizes and Quarter Sessions, an excellent illustration of the effect which usually follows the substitution of summary proceedings for proceedings by indictment. "The procedure in these cases has been made quicker, simpler, and cheaper, and this has been followed by an immediate increase in the number of prosecutions." The Editor calls attention to the fact that precisely the same result on a larger scale followed the passing of the Summary Jurisdiction Act 1879. Prosecutions for the offences which that Act made punishable summarily increased at once, and remained at a high figure for some years; then they began to decrease, no doubt

because the fact of punishment being quicker and more certain began to have its effect. It is to be hoped that the Act of 1899 will in the same way lead ultimately to a reduction in the number of the offences with which it deals.

In the *Contemporary Review* for June Mr. Holt Schooling has an article on the increase of fraud of recent years, in which he gives some interesting figures. He points out that for the years 1885-9 the annual average of frauds reported to the police was 1,879, of all other crimes 85,024. For the years 1895-9 the average of frauds was 2,599, of all other crimes 76,860. An increase of 38·3 per cent. in frauds has coincided with a decrease of 9·6 per cent. in all other crimes taken together. Mr. Schooling was writing without access to the 1900 figures, which confirm his case by showing a further increase: the number of frauds reported to the police was 2,772.

Mr. Schooling considers these figures very melancholy reading, for several reasons. In the first place, he thinks that fraud is probably understated in the official records more than any other crime, and that for a few frauds which are discovered and punished there are very many which the victims are unable or unwilling to prosecute. He maintains that fraud is morally one of the worst crimes that can be committed, and that in addition to the moral aspect of it, it is peculiarly fruitful of material injury. One murder usually only disposes of one man, but one case of fraud recorded in the statistics may stand for scores of people ruined. The growth of fraud to which he draws attention appears to him therefore to be symptomatic of an unhealthy state of society. And the precise evil to which it points is in his opinion a combination of luxury and recklessness—a desire to live well without the trouble of earning money honestly.

There is probably a good deal of truth in these views, though they rest on an imaginative interpretation

of the statistics. Certainly we cannot get all this out of the bare figures. But there is one point in which the 1900 tables reinforce Mr. Schooling's argument. The marked increase in prosecutions consequent upon the permission to use summary proceedings against fraud, is a clear indication that many cases must have gone unnoticed before this change was made—that behind the recorded cases is a mass of unrecorded frauds, some part of which may be reached by a change of procedure.

In another point we think he is too pessimistic. He shows that the percentage of cases tried to crimes reported, is diminishing in the case of frauds, and argues from this to the subtle and dangerous nature of the crime. But the figures of crimes reported are of doubtful value, and further we do not think that—in many cases at any rate—the disparity between crimes and prosecutions means much more than that a man commits a whole series of frauds and is only put on his trial for one or two selected cases.

The increase of fraud may or may not be a consequence of the luxury and laziness of the present generation. We should incline rather to the view that it is part of the general change of manners—the decay of violence—to which we called attention in our article on the 1899 Statistics. Fraud is the characteristic crime of a complex, highly civilised, industrial period, as violence is of a rougher and simpler age. Our ancestors went in for larceny and highway robbery: we prefer politer and more recondite methods of cheating. The dishonesty is the same at bottom, but takes a different outward form.

We have seen that the total number of persons tried for indictable offences in 1900 (taking together those tried on indictment and those tried summarily) was 53,628, 3,100 more than the total for 1899, and about 1,100 more than the total for 1898. The Statistics for 1900 give for the first time a Table (BB), containing particulars of the persons

tried for indictable offences, whether summarily or on indictment, from 1893 onwards. This table furnishes a most interesting bird's eye view of the variations from year to year in the more serious crimes.

The fluctuation in numbers is within tolerably narrow limits: the highest total was 57,357 in 1893, the lowest 50,494 in 1899. With regard to the distribution of offences, we find that Class I (offences against the person) was unusually small in 1900. There were 1,500 offences of violence and 1,066 sexual offences, while the average for the years 1896—1900 was 1,603 and 1,126 respectively. But these variations are slight, and probably merely casual: at any rate it would be quite unsafe to build much upon them. In Class II (offences against property with violence) there is a rise of 180 in the number of burglaries—1,953 as against 1,773 in 1899, and an average of 1,797 for the five years 1896—1900. This again is a casual fluctuation on which little stress can be laid: it should be noted, however, that some part of it is due to the Summary Jurisdiction Act 1899, to which reference has been made above. Class III (offences against property without violence) shows a large increase—over 3,000 under the head of larceny and receiving, and nearly 300 under that of fraud. Indeed, the figures under Class III entirely dominate the number of indictable offences: this class contains 47,783 out of the total of 53,628, and the increase under larceny and receiving, accounts for almost the whole increase of the year.

No special reason can be assigned for this increase in larceny and receiving in 1900: and it may be noted that the figures for these offences are subject to considerable fluctuations. Thus in 1896 and 1897 the number was between 43,700 and 43,900; in 1898 it suddenly rose to 45,400; in 1899 it dropped again to little over 43,000; and in 1900 it rose once more to 46,000.

The increase in fraud, we have already seen, is to be largely accounted for by the operation of the Summary Jurisdiction Act 1899. Under this head it is perhaps worthy of note that the offence of larceny by servants has been steadily increasing since 1895, when the number was 2,405, until in 1900 it stood at 3,146. This is not altogether an agreeable feature.

Classes IV, V, and VI all present very small totals, and are of little importance. Class IV contains arson and other malicious injuries to property: the total for 1900 was only 328, or 6 above the average for the last 5 years. Class V (forgery and offences against the currency) gives a total of 255, or 55 less than the 5 years' average. One noteworthy point about it is that the offence of coining continues steadily to decline: the averages for the four quinquennial periods since 1881 are respectively 317, 224, 141, and 101, and the actual figure for 1900 is 70.

Class VI consists of the offences not included in the other five classes. It is a small matter; the total number of cases is 529, and they are divided between 18 different offences. The numbers for most of these offences are very small: attempted suicide accounts for 192 of them, and this number is the average for the past 5 years. It may be of some interest to note that the Inebriates Act 1898 is now beginning to leave its mark on the statistics. That Act created the new offence of "habitual drunkenness" (penalty 3 years' detention in an inebriate reformatory), and there were 89 cases of this kind in 1899, and 131 in 1900. This can hardly be taken as representing the full effect of the Act. It is notorious that for some time after it was passed its adequate enforcement was hampered by the want of sufficient accommodation in inebriate reformatories, so that it was frequently necessary to discharge prisoners for whom no reformatory could be found. This difficulty has been partly overcome by the establishment of a Government

reformatory; and it is extremely probable that the number of convictions for this offence will continue to increase for some time.

So far we have been dealing with the figures of persons actually tried, and we may be reasonably certain that they do not overstate the number of crimes committed. Where a trial takes place, it is safe to assume, in 99 cases out of 100, that a crime has been committed by someone, if not necessarily by the defendant. But there are many crimes committed for which no one is ever brought to trial; and it is a very difficult matter to ascertain, or even to form an opinion, what ratio the number of persons tried bears to the total volume of crime in the country.

It is, however, possible to compare the former figures with the table of crimes known to the police. It will be remembered that the total number of prosecutions for indictable offences was 53,628; the number of indictable offences known to the police was 77,934, 1,900 more than in 1899, but over 4,000 less than in 1898, and 800 less than the average for the years 1896—1900.

But the Editor is careful to warn us that the figures of crime known to the police are of no great statistical value. All that can be said of them is, that they "show the number of crimes which, *in the opinion of the police*, were reported to them." They are an estimate, and an estimate framed on different principles by different police forces, and sometimes on different principles by the same force in different years. The Home Office instructions to the police are that all crimes reported to them are to be returned, except those cases in which it turns out that no crime was in fact committed. The natural result is, that the lists of alleged crimes are sifted with varying degrees of strictness by different forces. "Some police forces include in the return every case of alleged crime reported to them, while others carefully examine the returns and reject all those in which

they think that no crime was committed—with, in some instances, a strong bias in favour of reducing their tale of crime by holding that there can be no crime where no criminal is discovered." Consequently, the per-centage of persons prosecuted to crimes reported fluctuates from district to district in the most startling way. For the country generally it is 77 per cent.: in the City of London it is 36 per cent.; in Manchester it is 105 per cent.

The case of Manchester, to which the Editor draws special attention, is of particular interest. The per-centage has risen with a bound from 68 in 1899 to 105 in 1900. This is produced by an increase of 24 in the number of prosecutions, and a decrease of 887 in the number of crimes. Something is probably due to increased police efficiency; but the Chief Constable explains that the change is largely caused by an improved system of book-keeping which renders it easier to clear the list of doubtful cases.

This is a striking proof of the necessity for caution in building conclusions on these figures. At the same time it must not be forgotten, that the tables of crimes reported to the police show the same steady decrease as those of actual trials: whatever their imperfections, they bear out the general result of the other figures—that crime is largely decreasing. For the years 1881–5 the annual average was 94,473: for 1896–1900 it is 78,781.

We come now to the number of convictions in proportion to cases tried. Of the 10,149 persons who were prosecuted at Assizes and Quarter Sessions, 7,975—78·5 per cent.—were convicted. Of the remainder 300 were never actually tried; in 10 cases the proceedings were dropped, in 267 the Grand Jury did not find a true bill, and in 23 cases the jury found the accused insane and unfit to plead. 26 persons were found to be guilty but insane.

The per-centage of convictions has slightly decreased since 1899—from 79·0 to 78·5. It shows very slight fluctuations

however: for during the past 5 years it has never been higher than 79·7 or lower than 78·5. This is of considerable interest, as showing that the Criminal Evidence Act 1898, which was criticised with considerable warmth, has apparently had no effect whatever either one way or the other upon the proportion of convictions to acquittals, at any rate in cases tried at Assizes and Quarter Sessions.

For persons tried summarily for indictable offences the per-centage is somewhat higher, viz., 81·15; for 1899 it is 80·52, and for 1898, 79·9.

The statistics of summary proceedings for other than indictable offences are of considerable interest this year. Since 1893, when they numbered 604,310, they have risen steadily, until in 1899 they amounted to 761,322. In 1900, however, there is a fall of no less than 44,097—the total being 717,225. We explained in our article on the Statistics for 1899 that the increase in these prosecutions need not be regarded as a very serious matter, since a very large proportion of the total prosecutions related to offences which were only criminal in a technical sense. The same thing applies to the decrease of this year. Nearly half the decrease (close on 20,000) comes under the head of “offences relating to dogs,” and merely reflects the withdrawal of muzzling orders. There is a drop of 2,000 in offences against the Highway Acts, and nearly 3,000 in offences against police regulations, neither of which classes consists of acts of a very criminal nature. A diminution of over 2,000 in begging and sleeping out is probably a result of the general prosperity of the year 1900, but a fall of no less than 10,000 in prosecutions for drunkenness is peculiar, and not easy to explain. It should, however, be remembered, that the total of prosecutions for drunkenness in 1899 (214,298) was an enormous increase over the preceding years, and that the 1900 total of 204,286 is still higher than any previous year since 1881, except 1899, and is nearly 4,000 above the

average for the last five years. A fall of 4,000 in the number of common assaults is also noteworthy; the total for 1900 (52,479) is the lowest since 1881, and is more than 4,000 below the quinquennial average.

In speaking of the 1899 statistics some time ago we called attention to the very serious increase in the number of summary prosecutions for gaming, which rose from 14,419 in 1893 to 24,578 in 1899. Unfortunately there is no sign of any substantial decrease in 1900: the number is practically the same, 24,554. The statistics of gaming prosecutions are, in our opinion, the most discouraging feature about the tables of summary proceedings.

It is perhaps worth noting that the number of prosecutions for adulteration of food and drugs has been on the increase for 20 years, and continues to rise. For the five years 1881-5 the average was 1,510: in 1886-90 it rose to 1,784, and in 1891-5 to 2,833: in 1896-1900 the average was 3,197, and the actual figure for 1900 was 3,545. This has rather an unpleasant look at first sight, but we doubt if the figures are really as bad as they seem. We think that the increase probably points not so much to an increase in the practice of adulteration as to an awakening of public opinion on the subject and the adoption of more stringent measures to put it down. It is certainly noticeable that nearly a third of the total number of cases, 1,079, come from the County of London alone, where the County Council is known to be especially active in this matter.

This year for the first time a table is given as an appendix to the introduction, which contains details of the way in which different benches exercise their power of releasing offenders without punishment where they think the circumstances make it desirable. These powers are twofold. There is first the power given by section 16 (1) of the Summary Jurisdiction Act 1879, to discharge offenders without conviction where they are proved to be guilty of

merely trivial offences; and, secondly, the power of releasing convicted persons on recognisances given by section 16 (2) of the same Act, the Probation of First Offenders Act, and other statutes.

In England and Wales generally, 4·62 per cent. of the total number of persons tried summarily were released under the first-named power, 1·95 per cent. under the second. The figures plainly reveal great diversity of practice in different places. Thus, in Gloucestershire 10 per cent. of the persons prosecuted were discharged without conviction: in Bristol almost as large a proportion were released on recognisances, while there are some districts, including large boroughs like Burnley, where these powers were not used at all.

Speaking generally, however, the table shows that these powers are more freely used in towns than in the country. The counties are responsible for 40·11 per cent. of the total number of prosecutions, and 32·58 per cent. of the total number of releases under these powers. But the boroughs had 36·42 per cent. of the prosecutions and 36·62 per cent. of the releases, and London had only 23·74 of the prosecutions to 30·79 per cent. of the releases.

Two other points of some interest arise in connection with summary proceedings. One is the very small number of appeals. There were 580,000 people convicted summarily in 1900 (excluding convictions for indictable offences), and there were only 137 appeals. The smallness of the number is especially noticeable, as 63 of these were in cases arising out of the intoxicating liquor laws, and 19 of the remainder were for various kinds of assaults. The figures for previous years are very similar: in 1899 there were 121 appeals out of 616,000 convictions, and of these 46 were for offences connected with the intoxicating liquor laws, and 26 for assault; in 1898 there was 174 appeals, 60 for licensing offences, and 51 for assaults; in 1897, 157, 66 in licensing and

28 in assault cases. This striking disproportion between the number of appeals in licensing law cases and all other classes of offences, may not unnaturally be put down to the fact that these convictions often endanger a public-house licence, which is a valuable property. There is therefore considerable reluctance to allow the conviction to stand if it can possibly be upset; and money for an appeal is readily found, if not by the defendant, by other persons interested in the retention of the licence. This view is confirmed by the fact that of the 61 appeals in 1900 only 6, and of the 46 appeals in 1899 only 3 were in cases of simple drunkenness: all the rest related to offences by publicans, *e.g.*, permitting drunkenness, illegal sale of drink, &c. And the figures for previous years tell the same story.

It is to be feared that the right of appeal to Quarter Sessions is too costly a remedy to be of much practical value to the poor men who form the majority of those convicted by summary courts. The poverty of the average defendant in these cases is shown by the large proportion who go to prison in default of payment of fines (which are often of very small amount). Out of 530,000 persons fined 78,000 went to prison in default. Since 1893 the number of persons so imprisoned has never been less than 74,000, and in 1898 and 1899 it rose to 84,000 and 83,000 respectively.

The other point referred to above is the number of orders for possession of small tenements (under 1 & 2 Vict. cap. 74), which is given in Table XIV (Quasi-Criminal Proceedings). The total was 12,672, a decrease as compared with the 14,256 of 1899. But it is noteworthy that the number of these orders has increased in a very marked way in the last seven years. In 1893 the number was 6,608; in 1896 it had risen no higher than 7,953. But in 1897 it rose at a bound to 11,619, and it has been well above that amount ever since. It would be interesting to have some information (which unfortunately the statistics do not give) as to the local

distribution of these cases, and particularly whether they arise in greater numbers in large cities. If so, it would go far to confirm the conjecture which naturally arises in one's mind, that this increase is connected with the difficulty of finding housing accommodation, which is well known to press with great and increasing severity on the poorer classes in London and other large towns.

Coming now to figures which relate more particularly to prisoners, we find that the proportion of persons convicted at Assizes and Quarter Sessions who have previous convictions against them continues to increase. It was 55 per cent. in 1893, but in 1898 it was 60·2 per cent., and in 1900, 61·2. This increase is unquestionably due in great part to improved means of identifying criminals, and the Editor anticipates that now that the finger-print method of identification is being extended a further rise in the proportion will take place. The figures are of great interest, as tending to show that the more serious crime of the country is to a great extent in the hands of a small professional criminal class, and it is a relief to find that the criminal infection is not widespread.

Moreover, it is quite plain that the criminal classes are chiefly drawn from the uneducated strata of the population. Of 146,000 convicted persons in 1900, 28,000 could neither read nor write, 111,000 could only read, or could read and write imperfectly, less than 6,000 could read and write well, and only 86 were of superior education. These proportions show little alteration in the last few years.

The tables for 1900 show for the first time the effect of the Prison Act 1898, which enables any Court passing a sentence of imprisonment without hard labour to direct, if it sees fit, that the prisoner should be treated as an offender of the first or second division, a classification which carries with it a proportionate reduction of the hardships of imprisonment. Of 45,463 prisoners sentenced to imprisonment

without hard labour, 2,023 were ordered to be placed in the second division, and only 50 in the first. And 45 out of those 50 were offenders against the Vaccination Acts, who are expressly required by the Vaccination Act 1898 to be placed in the first division.

The last table in the book (No. LII) deals with the exercise of the prerogative of mercy. It appears that during the year 1900, 375 persons were granted remissions of sentence; of these only 13 received remission on grounds affecting the original conviction, while 93 remissions were granted on medical grounds, and 245 in simple mitigation of sentence. These figures are of some interest, as tending to show that the number of persons in prison the justice of whose conviction is at all doubtful is not large. The Home Office is clearly not unwilling to grant remissions, as appears from the large number granted on medical and other grounds. The natural inference therefore from the smallness of the number given because doubt is felt as to the original conviction is that there are very few men in prison who can make out any sort of case for supposing that they were wrongfully convicted.

One of the constituent elements of Table LII has a special interest of its own. We refer to the 127 cases in which the requirements of the Penal Servitude Acts were remitted. These were all cases in which persons sentenced to penal servitude had earned a release on licence by good conduct, and after they had been at large for a short time it was found possible to excuse them from their obligation to report themselves once a month to the police. The Editor of the 1897 Statistics explained that it is now the practice, when a convict with no previous criminal record is licensed, to ascertain after a few months whether he is living honestly, and if the report is favourable to remit the obligation to report to the police. He pointed out with great force that the fact that convicts who have not been habitual criminals,

so frequently turn out well on their release goes far to show that penal servitude "has not the effect, which is sometimes attributed to it, of crushing the moral responsibility of persons subjected to it or of barring a return to the paths of honesty." And the fact that a favourable report is so frequently received further suggests that if an ex-convict is really anxious to live honestly, police supervision does not put so many obstacles in the way of his doing so as is sometimes supposed by tender-hearted people.

There remains one point to be considered—the number of persons who were imprisoned before trial. This is a matter to which we have called attention more than once, and it is one of great importance. A poor and uneducated man accused of a crime is quite sufficiently handicapped by the fact of poverty and ignorance: if he is also shut up in prison for some weeks before trial, the obstacles in the way of his organising his defence become very serious indeed. We are therefore glad to note that the figures for 1900 show that the Bail Act of 1898 is beginning to bear fruit. Out of 10,379 persons committed for trial, 2,519 or 24·27 per cent. were admitted to bail. Last year the proportion was 22·51, and in 1897 it was 19·56. This is a distinct though small rise, and we hope that it will be increased in future years. But 2,925 persons, of whom 372 were afterwards acquitted, were detained in prison for upwards of four weeks: and 366 people, of whom 56 were acquitted, were kept in prison for upwards of 12 weeks; while 58, of whom 12 were acquitted, were detained for more than 16 weeks. It is quite probable that all those who were acquitted were not innocent, but even allowing for this, these enormous periods of detention are a very disagreeable feature of English justice.

III.—LORD CHANCELLOR LYNDHURST.

EVERYONE is familiar with Brougham's famous remark, that Lord Campbell's *Lives of the Chancellors* had added a new terror to death. Campbell was certainly not a biographer who would have been readily chosen by men ambitious of having their defects concealed from posterity. He refused to hide weaknesses; he toned down no faults; he was the candid critic. He had some old scores to pay off against the later Chancellors, and he took his revenge with relish and gusto. He was not deliberately unfair; he was simply impartial; and impartiality in the case of some men makes sorry work of their careers. Campbell's *Life of Lord Lyndhurst* was displeasing to Lyndhurst's relatives, and Sir Theodore Martin, in a second biography, attempted to refurbish a reputation which Campbell's work had done something to tarnish. The reader who has perused both biographies feels, as it were by instinct, that the caustic Scotchman gives the truer portrait. Sir Theodore Martin is too eulogistic; Campbell's ghost stands beside him, like Cæsar's ghost beside Brutus, and Martin frequently appears to be, consciously or unconsciously, refuting an unseen opponent. He overpraises his hero to mitigate the depreciation of the rival biographer. It may not be uninteresting to glance at the character and career of the brilliant Chancellor, whose story has been told by both Campbell and Martin.

The early life of John Singleton Copley, afterwards Lord Lyndhurst, was like that of many other famous lawyers, one of long obscurity, and fame slowly acquired. "*Nitor in adversum*," said Burke, "is the motto for a man like me." It was the motto for Copley. He had attained the age of forty-five years, before he emerged from the crowd of contemporary rivals. In 1817 he defended Dr. Watson,

who had caused a dangerous riot by incendiary speeches in Spa Fields, near London. Watson, who was charged with high treason, was acquitted, and the ability displayed by Copley attracted the attention of Lord Liverpool's government, then in power. Copley was approached by the ministry, and in the same year he was returned to Parliament for the Treasury borough of Yarmouth, in the Isle of Wight. Copley had hitherto been regarded as a man of Radical views, and Campbell says that, in early life he had danced round the Tree of Liberty to the tune of *Ça ira*. Born as he had been in America, his early opinions had been undoubtedly influenced by the American Revolution. Those who had mixed with him in social converse spoke of democratic opinions and revolutionary sentiments, uttered in moments of confidence. With his acceptance of a Treasury borough, he became a supporter of the Tory government, and, as the Reformers declared, a deserter and an apostate. Again and again his alleged abandonment of his early opinions was cast in his teeth.

“ Just for a handful of silver he left us,
Just for a riband to stick in his coat.”

Copley repudiated the charge of Radicalism, and asserted that his acceptance of a seat from Lord Liverpool was his first embarkation upon the stormy sea of politics. But there can be little doubt that in early life he had professed advanced political views, and that, as Lord Denman said, those who assisted him in his early professional career were inclined to do so by their impression of his Liberal leanings in politics.

In 1818 Copley became Chief Justice of Chester. In 1819 he became Solicitor-General, and in 1824 Attorney-General. As a rule, the law officers of the Crown are content to confine themselves chiefly to their own department, and do not aspire to be prominent politicians. Occasionally there have been exceptions. Lord North found his most powerful sup-

porters in Mr. Attorney Thurlow and Mr. Solicitor Wedderburn. Gibbon describes the law officers as sitting one on each side of Lord North, the "Palinurus of the State," who slumbered in peace, while his two able henchmen kept watch and ward. Copley was almost as valuable to the Liverpool ministry as Thurlow and Wedderburn had been to North. He was the politician and statesman as well as the lawyer, and Lord Liverpool found him a most useful auxiliary in his difficult task of piloting the vessel of state. In April 1827 Copley became Lord Chancellor, with the title of Lord Lyndhurst, and held the office till November 1830, under the successive premierships of Canning, Goderich, and Wellington. From 1830 to 1834 he filled the post of Lord Chief Baron of the Exchequer. In November 1834 he again became Chancellor, and retained the office till April 1835, first under Wellington and then under Peel. In September 1841 he once more filled the highest legal post, and held it till July 1846, Peel being his chief. In 1863 he died, in his ninety-second year. In the House of Lords Lyndhurst was in a fitting sphere. For over thirty years he charmed the peers by his graceful eloquence. Lyndhurst filled a large space in the political world, and there were times when it appeared as if he might have been First Lord of the Treasury, if he had so desired. The Duke of Wellington sincerely admired the brilliant Chancellor. The plain, blunt soldier fell under the spell of the silver-tongued lawyer. The relations between Peel and Lyndhurst, on the other hand, were never cordial. The difference between them was as great

"As is the difference betwixt day and night,
The hour before the heavenly harness'd team
Begins his golden progress in the east."

Peel was all solemnity, seriousness, "sublime mediocrity," ostentatious integrity, addressing the House of Commons, as it was once said of Gladstone, as if he had just had

the Ten Commandments delivered to him. Lyndhurst was witty, satirical, lax in life and conversation, a man of fashion, sitting lightly in the saddle of life. Peel and his Chancellor were too diverse to be ever cordial friends.

It is interesting to note that Lord Lyndhurst was one of the first to recognise the ability of Disraeli. When the young politician was raised up like Shamgar, the son of Anath, to smite the Philistines with an ox-goad, Lyndhurst readily extended to him a helping hand. The originality and courage of the aspiring novelist had a special charm for one who was himself abundantly endowed with the same qualities. Disraeli dedicated to Lyndhurst his *Vindication of the English Constitution* and his novel *Venetia*. When the *Runnymede Letters* appeared in the *Times* in 1836, it was commonly but incorrectly said, that they were the joint production of the ex-Chancellor and the author of *Vivian Grey*. Disraeli was a welcome visitor at Lyndhurst's house, and Lyndhurst went occasionally to Disraeli's home at Bradenham, and seems to have enjoyed a ramble among the Chilterns with his young host. The ex-Chancellor eagerly read all that Disraeli wrote, and in January 1838 he is found writing from Paris to a friend, asking that *Henrietta Temple*, which had just been published, might be sent to him. The materials for the beautifully written description of Queen Victoria's first Council, in *Sybil*, were supplied by Lyndhurst, who took Disraeli with him in his carriage to Kensington Gardens, and on their return journey gave him a full account of the historic scene. Lyndhurst did all he could to help the early aspirations of the future premier, and secured his warm affection and gratitude. "The world," said Disraeli in 1870, "has recognised the political courage, the versatile ability, and the masculine eloquence of Lord Lyndhurst; but his intimates only were acquainted with the tenderness of his disposition, the sweetness of his temper, and the playfulness of his bright and airy spirit."

As a judge Lyndhurst received the high commendation of that unsparing critic Lord Campbell. "I did not regularly practise before him," says Campbell, "but I often went into his Court, particularly in revenue cases, after I became a law officer of the Crown, and as often I admired his wonderful quickness of apprehension, his forcible and logical reasoning, his skilful commixture of sound law and common sense, and his clear, convincing, and dignified judgments." The fame of many judges is not unlike that of the great actors. Men read of the triumphs of a Colley Cibber and a David Garrick, of a Mrs. Bracegirdle, and a Mrs. Oldfield, and a Mrs. Woffington, but their abilities have to be taken on trust. There is nothing which a subsequent age can test. The evidence of contemporaries is the only proof of their greatness. The genius of some great judges is equally difficult of proof. "There is Lord Somers," says Bagehot. "Does anyone know why he had such a reputation?" The same may be said of Lord Lyndhurst. His name is not associated with any great legal doctrine or leading case. He left no great judgments behind him, to which future generations of lawyers would have recourse. He did not enjoy the opportunities of a Mansfield or a Hardwicke. He was careless of judicial fame, and took no pains to acquire it. But he impressed the world with the conviction that he was a great judge, and alike in the Court of Chancery and the Court of Exchequer he extorted admiration from all who appeared before him. He had not the lofty ideals and the high professional aspirations that were to be found in a man like Romilly. Romilly relates one of the reasons that induced him to become a barrister. "The works of Thomas had fallen into my hands," he says. "I had read with admiration his *éloge* of Daguesseau; and the career of glory which he represents that illustrious magistrate to have run, had excited to a very great degree my ardour and my ambition, and opened to my imagination

new paths of glory." This piece of information seems to give a clue to the significance of Romilly's noble career. There was no trace of this sort of spirit in Lyndhurst. He was a great judge, because, placed on the judicial bench, with his great intellect he could not help being anything else. There was one conspicuous merit which he possessed, and which is worthy of mention. Although professing to act on the principle that it is the duty of a judge to make it disagreeable to counsel to talk nonsense, he was always courteous to the members of the Bar, and was a great favourite among them.

Much of Lyndhurst's *prestige* and position was due to his social qualities. Many great judges and lawyers have vastly lessened their influence by going about in shabby personal attire, and by maintaining a mean domestic *ménage*. Dickens drew what he doubtless considered a typical picture of an eminent lawyer in his portrait of Mr. Sergeant Snubbin. The coat collar sprinkled with hair powder, the ill-washed and worse-tied white neckerchief, the neglected and slovenly dress, the dirty and dusty chambers; these are characteristics which have not disappeared even in this age of perfection. Lyndhurst never made this kind of mistake; he was the antithesis of a Sergeant Snubbin. As soon as his position allowed of it, he shocked Lord Eldon and other worshippers of tradition by throwing aside the staid airs and sober garb of the Inns of Court, and by adopting the airs of a man of fashion. "What," said Lord Eldon, "would my worthy old master, George III, have thought of me, had he heard of his Attorney-General comporting himself like a prodigal young heir, dissipating a great fortune?" In 1819 Lyndhurst married Mrs. Thomas, a beautiful young widow. Hitherto, says Lord Campbell, his converse with the gay world had been very limited; he had seldom been in higher society than at a Judge's dinner in Bedford Square; he himself generally dined at a coffee-

house, and, when the labours of the day were over, he solaced himself in the company of his friends in Crown Office Row. After his marriage, he set up a brilliant establishment in his father's old house, George Street, Hanover Square, which he greatly enlarged and beautified. Lady Copley was exceedingly handsome, with extraordinary enterprise and cleverness. She took the citadel of fashion by storm, and her concerts and balls, attended by all the most distinguished persons who could gain the honour of being presented to her, reflected back new credit and influence on her husband. The Lyndhurst household became a centre of fashionable life. The master, as well as the mistress of the house, was eminently qualified to shine in society. His judicial labours only added zest to social pleasures. It is said that the poet Keats used to pepper his tongue, "to enjoy in all its grandeur the cool flavour of delicious claret." Lyndhurst's work as a lawyer was the pepper which brought out the flavour of society. The impression which he made upon the public is described by one who saw him in 1832. "He came to Beaumaris accompanied by Lady Lyndhurst, but I scarcely saw her, and remember little of her but her brilliant eyes and fashionable bearing. . . . When I met him and Lady Lyndhurst walking up the street to their hotel, he looked more like a cavalry officer than a solemn judge, for he was dressed, according to the fashion of the day, in white Russia duck trousers strapped under his boots of polished leather, and in a becoming frock coat. His gaiety of air, his handsome well-cut features, his straight figure, had all a soldierly cast."

The contemporary opinion about Lyndhurst varied with the politics of the person who expressed it. Disraeli's description of the Chancellor has already been quoted. A much less flattering estimate was made by the Whigs. He was denounced by them as a political mercenary. Lord Campbell pictures him as a self-seeking opportunist, ready

to throw over principle at any time for the sake of personal advantage. In the case of Lyndhurst, as in that of so many others, the truest estimate will be found in the mean between the condemnation of the Whigs and the eulogy of the Tories. He was a politician of the type of Palmerston, fond of power, enjoying life, fluttering in society, without any very keen sense of principle, content "to leave things alone," having the brains of a ruler in the clothes of a man of fashion, as Bagehot said of Palmerston. The Whigs, while condemning his character, admitted his abilities. Bagehot wrote after his death, "Such was the great man whom we have just buried; great in power, but not great in the use of power; a politician, not a statesman; a man of small principles and few scruples. Of him, far more truly than of Burke, it may be said that 'to party he gave up what was meant for mankind.' He played the game, of life for low and selfish objects, and yet, by the intellectual power with which he played it, he redeemed that game from its intrinsic degradation." Lord Melbourne expressed much the same view in his reply to Lyndhurst, when reviewing the work of the Session on 18th August 1836:—

"I readily admit," said Melbourne, "the great powers and eloquence possessed by the noble and learned Lord opposite—his clearness in argument and his dexterity in sarcasm cannot be denied; and if the noble and learned Lord will be satisfied with a compliment confined strictly to ability, I am ready to render that homage to him. But, my Lords, ability is not everything. Propriety of conduct—the *verecundia*—should be combined with the *ingenium*, to make a great man and a statesman. It is not enough to be *dura frontis, perdita audaciæ*. The noble and learned Lord has referred to various historical characters, to whom he has been pleased to say that I bear some resemblance. I beg in return to refer him to what was once said by the Earl of Bristol of another great statesman of former times (the

Earl of Strafford), to whom, I think, the noble and learned Lord might not inapplicably be compared. 'The malignity of his practices was hugely aggravated by his vast talents, whereof God had given him the use, but the devil the application.'"

The intellectual abilities of Lord Lyndhurst were undoubtedly of the highest order. Bagehot considered that he had the most disciplined intellect of his time; like Hotspur,

"Amongst a grove, the very straightest plant."

Every one of his productions gave evidence not only of natural sinewy strength but of careful culture as well. Lord Brougham told a story of finding him occupied over the integral calculus for amusement's sake. Lyndhurst's powers as a speaker were conspicuously great. He was, like Crassus, *vir summa diligentia et facultate dicendi*. All great oratory is the result of *diligentia*, of careful preparation, and the Chancellor had studied the principles of the Greek orators, and applied them in his speeches. His utterances possessed a clearness as of crystal and an exquisite simplicity, the effects of which were sometimes heightened by a studied humility on the part of the speaker. "He must have known," said Lyndhurst of one of his clients on an important occasion, "that I possessed no powers of eloquence and little of the skill of an advocate." Such professions of inferiority remind the reader of Cicero's reference to "*hac mea mediocritate ingenii*," and Burke's talk of "the mediocrity of my talents and pretensions." Lyndhurst's oratory was not of the ornate kind, beloved of Canning. He did not dress himself in a rich wardrobe of words, as Flood said that Grattan did. "Their art," wrote Bagehot of his speeches, "we might almost say their merit, is of the highest kind, for it is concealed. The words seem the simplest, clearest, and most natural that a man could use. It is only the instructed man who

knows that he could not himself have used them, and that few men could." Lyndhurst's minute knowledge of Shakspeare and the classics, both English and Latin, enabled him to enrich his speeches with apt and telling quotations. His retentive memory and his habit of deep research provided him with a fund of historical instances, which he could summon to the aid of his arguments on all occasions. Like Mr. Gladstone, he retained his intellectual vigour to advanced old age. His speech on the 7th of February 1856, delivered in his eighty-fourth year, in support of the resolution "that Baron Wensleydale, under the grant of a peerage to him for life, had no right to sit in Parliament as a peer, was, I really believe," says Lord Campbell, "the most wonderful ever delivered in a deliberative assembly."

"Without ever referring to a note," says Lord Campbell, "he went over all the instances of peerages for life—from that of Guiscard de l'Angle, in the reign of Richard II, to Lady Yarmouth's in the reign of George II—showing that not one of them was a precedent for a peer for life, as such, sitting in Parliament; he turned into ridicule Lord Coke's dictum that the grant of a peerage for life would be good, although for a term of years it would be bad, because it would go to executors; he was very droll upon the grants of peerages for life to the royal mistresses, who had never claimed a right to sit in the House or to vote by proxy; he even ventured, with an air of triumph, to rely on Lord Chancellor Shaftesbury, because this profligate statesman had thrown out something against life peerages, as a great legal authority, quoting Dryden's well-known lines:—

" In Israel's courts ne'er sat an Abethdin
With more discerning eyes, or hands more clean,
Unbribed, unsought, the wretched to redress;
Swift of dispatch, and easy of access."

Coming to constitutional considerations, he pointed out with irresistible force the fatal consequences of the attempted

innovation, illustrating his argument with the contempt and insignificance into which Louis Philippe's Assembly of Peers for Life fell, followed by the extinction of freedom in France."

As a characteristic specimen of Lyndhurst's political oratory, the description of Daniel O'Connell, in which the Irish leader is compared to Catiline, may be quoted :—

"This person has so scathed himself, has so exhibited himself in a variety of postures—not always the most seemly and decent—amid the shouts and applause of a multitude, that all description upon my part is wholly unnecessary. But these exhibitions have not been bootless to him ; he has received lavish contributions, I may say ducal contributions, from the connections of the present Government, while at the same time he has wrung, by the aid of the priests, the miserable pittance from the hands of the starving and famishing peasant. This person has in every shape and form insulted your Lordships, your Lordships' House, and many of you individually—he has denounced you, doomed you to destruction, and, availing himself of your courtesy, he comes to your Lordships' bar, he listens to your proceedings, he marks you and measures you as his victims—'*Etiam in senatum venit ; notat designatque oculis ad eadem unumquemque nostrum.*' The person whom these expressions originally defined had at least one redeeming quality—witness the last scene of his life, if you read it in the description of the historian. Mindful of his former elevation and dignity, so able, so politic, so eloquent, he ever retained the virtue of courage. Where was the accusation against me made, and under what circumstances ? At a meeting of the inhabitants of this city, in the midst of the friends of free institutions, those declaimers for justice—eternal justice—there did he, for the edification of his audience, vent his coarse and scurrilous jests at the murder of a monarch, and at the same time, and almost in the same

breath, insulted by the insidious venom of his flattery the successor of that monarch, our present most gracious sovereign."

J. A. LOVAT-FRASER.

IV.—SOVEREIGNTY AND LAW.

STUDENTS of history, constitutional law and jurisprudence have long been indebted to Mr. Bryce. His latest published work¹ adds greatly to their obligations. It is not too much to say that it is years since the press has given them so interesting and especially so informing a treatise. As to the latter quality, it would be hard indeed to find the book's equal. It deals with many subjects widely separated in time and circumstance, and on all of them Mr. Bryce displays not simply competent but quite exhaustive information. Whether it is Primitive Iceland or the Australian Commonwealth he is discussing, he seems to know not merely all that is known of his subject, but also all that is known of anything relating to his subject. One might well say of him, as Bacon said of himself, that he has taken all knowledge for his province.

The subjects dealt with are, as I have said, widely separated, and yet they are so discussed as to make them all illuminate one topic—the importance of the legal element in the life of nations. It is peculiar how little attention this has hitherto received. Many of our greatest historians have been lawyers, yet it may be said, almost without reservation, that in no general history in the

¹ *Studies in History and Jurisprudence*. By James Bryce, D.C.L., author of *The Holy Roman Empire*, *The American Commonwealth*, &c., formerly Regius Professor of Civil Law in the University of Oxford; Honorary Fellow of Oriel and Trinity Colleges; Corresponding Member of the Institute of France. In two volumes. Oxford: at the Clarendon Press. 1901.

language is there any adequate consideration of the influence that the legal institutions, and especially the legal conceptions of the people whose history is being told, have had in making that history and in deciding that people's destiny. With the exception of Mr. Edward Jenks's *Law and Politics in the Middle Ages*, Mr. Bryce's book may, I think, be regarded as the only recent contribution to our literature on this most interesting thesis.

It is not intended to endeavour here to consider the vast ground covered by the sixteen essays contained in Mr. Bryce's work. It is sufficient to say of these essays generally that all of them deserve to be studied by every historian, every publicist, and every lawyer who takes something more than a bread and butter interest in his profession. Some of the matters discussed, however, appeal especially to the lawyer, or at any rate to the jurist, and it is appropriate that they should here receive a closer examination than they are likely to obtain in the lay press. Of these matters, by far the most important is jurisprudence.

The late Professor Cliffe Leslie used to define the province of jurisprudence as including the ethics of law, the logic of law, and the history of law. By the ethics of law he meant those principles of political morality which should control legislation. In his view Bentham was the greatest exponent of this department of jurisprudence, and his works dealing with the principles of legislation, the law of evidence, and the organisation of tribunals, were supreme examples of its proper treatment. By the logic of law he meant the analysis of legal conceptions, and the consequent affixing of definite meanings to legal terms and orderly arranging of the *corpus juris*. This department of jurisprudence is entirely an English creation, and its creator was Hobbes, whose arguments and conclusions were elaborated by his worshippers, Bentham and Austin. By

the history of law, Cliffe Leslie meant the history of the growth and development of the legal conceptions which are found in all mature systems of law, and in this department the most brilliant of English writers is undoubtedly Sir Henry Maine.

As might be expected of the author of *The Holy Roman Empire*, Mr. Bryce is chiefly interested in the history of law. He sees and admits, as do all the wiser of the historical school of jurists, that there is no natural or necessary antagonism between the historical and the logical, or, as he prefers to call it, the analytic departments or methods of jurisprudence. But this admission is followed (as it always is) by a general assault on all the works of the analytic jurists.

Mr. Bryce's quarrel with the analytic jurists turns chiefly (but by no means entirely) on two points—their analysis of the conceptions of sovereignty and law. As is well known, in their analysis of sovereignty, the analytic jurists insisted strongly that sovereign power could not be subject to legal limitation. This Mr. Bryce as strongly denies. He suggests that the notion was invented by Hobbes simply for the purpose of supporting his argument in favour of arbitrary government in England; and he contends that, so far from sovereign power being incapable of legal limitation, it is in fact subjected to legal limitation in almost every civilized country save England and Russia.

Of the first of these arguments there can be no dispute. It seems, however, scarcely relevant. Hobbes did not see, or did not choose to see, that there might be in England a sovereign people as well as a sovereign monarch. Algernon Sidney, who certainly was no supporter of arbitrary royal power, adopted fully Hobbes's definition of sovereignty, and it is plain that though it may be twisted, for polemical purposes, to support some particular form of government, it has in fact no relation to forms of government at all. It

relates to what is government, whatever the form of that government may be.

The second argument is much more to the point. Mr. Bryce divides constitutions into two kinds—flexible and rigid. By flexible constitutions are meant those in which the State legislature is entitled to legislate on all matters, including the constitution of the State itself. Of these the most illustrious example is the constitution of England. By rigid constitutions are meant those in which the State legislature is entitled to legislate only on matters outside the constitution of the State. Of these the most illustrious example is the constitution of the United States; but, generally speaking, every written constitution is usually also a rigid constitution. In States with flexible constitutions Mr. Bryce admits that the sovereign power is absolute; but he contends that in States with rigid constitutions the sovereign power is subject to legal limitation.

It seems to me that Austin's reply to this would be that Mr. Bryce confuses one of the bodies through which the sovereign power acts with the sovereign power itself, and that the legal limitations which Mr. Bryce cites are themselves imposed by the sovereign power on that body, and may be disregarded or removed at any time by the power which imposes them. Austin would have denied that in the case either of flexible or rigid constitutions the legislative assembly is necessarily the sovereign power. Indeed, when he applied his definition to England, he held that the sovereignty resided not in Parliament, but in the electors. This Mr. Bryce strongly dissents from, and no doubt constitutional theory is on his side. But the question is not one of theory, constitutional or otherwise; it is one of fact. And in fact it is the will of the electors which decides what shall or what shall not be law in England.

Surely the distinction between a despotism, an aristocracy, and a democracy, depends on whether the sovereign power

is lodged in one person, in a few persons, or in many persons. When Austin wrote (A.D. 1828) England was an aristocracy: it is now a democracy. There has been no change in the position or authority of Parliament. But there has been an immense change in the electorate.

Mr. Bryce himself divides sovereignty into *de facto* or practical sovereignty, and *de jure* or legal sovereignty. By the former he means the authority which, in fact, makes its will observed; by the latter the authority to whose directions the law attributes legal force. Practical sovereignty includes forces acting outside as well as within the law. The Molly Maguires, as long as they could enforce their will on the people, were in this sense practical sovereigns of Pennsylvania, as much as the Mayors of the Palace were practical sovereigns of France. And the Kings, in whose name the Mayors of the Palace ruled, were as much legal sovereigns of France as the Czar is legal sovereign of Russia.

Mr. Bryce works out this distinction with the greatest learning and ability, but whether it is not as artificial, does not need as much straining to make it fit the facts, as Austin's definition, may be doubted. Certainly under it some sovereigns find themselves in strange company. Austin would call no authority sovereign unless it was able in fact both to make and to enforce laws. Where the right to make laws and the power to enforce them became separated he would say there was a state of anarchy. Thus the Mayors of the Palace were, in his view, sovereigns as much before as after the last of the *rois faibles*, since before as after not merely did their will prevail but they made the laws. But the Molly Maguires were never sovereigns of Pennsylvania, since though their will might prevail in an irregular extra-legal way yet they never made the laws. Pennsylvania was simply in a state of anarchy until the laws were regularly made and

enforced. This mode of describing matters seems as much in accordance with the ordinary use of language as is Mr. Bryce's.

Mr. Bryce, as I have said, also quarrels with the analytic jurists' definition of law. Law, these jurists say, is a command addressed by a sovereign to his subjects, and enforced by a sanction. There may be law, Mr. Bryce contends, where there is neither sovereign nor sanction. He instances the law administered by the courts in primitive Iceland, which courts were established by agreement between different small communities acknowledging no political superior and without machinery or power to enforce their judgments. He denies, too, that law, even where there is a sovereign, necessarily comes from him. He points out that in most of the great empires of Asia the sovereign had nothing to do with the making of the laws observed by his subjects. Those laws arose out of the customs of the people, and the sovereign felt himself bound by them just as much as the subject.

No doubt this is perfectly correct. Its fault (if I may say so) is that it is beside the point. Austin expressly says that his definition applies only to mature law, and all these instances are taken from the law of archaic or unprogressive societies. Mr. Bryce goes further, however, and says that the bulk of the English Common law did not emanate from the sovereign but from custom. Whether in fact this is so seems somewhat doubtful. The whole history of circuit riding in early times is that of a struggle between the king's justices and the local authorities, feudal and otherwise. The constant effort of the king's justices was to oust local jurisdictions and local customs and substitute for them the king's courts and the king's law. That law, no doubt, was originally to a large extent the customs of Middlesex and the home counties; but when the king's justices held—as they are entitled to do to this day—that a local

custom in Yorkshire or Devon was "unreasonable," and that therefore the king's law applied, the king's law to the Yorkshireman or Devonian looked mighty like a command addressed by the sovereign to the subject, and enforced by a sanction.

Undoubtedly, to make the analytic jurists' definition of law fit anything but the most mature conception of law, a liberal use must be made of the principle that what the sovereign permits he commands. In English law, however, a much more modest principle will suffice: namely, what the sovereign enforces he commands. When does custom become law in England? Surely, only when it is recognised and enforced by the courts. And when will custom be recognised and enforced by the courts? That depends almost entirely on the interests of the sovereign. An example will prove this. In the case of copyholds a custom prevailed in most manors of permitting a serf's son to succeed to the lands held by his father as tenant at will. The practical sovereign, in Mr. Bryce's language, when this custom came before the courts, was the king, and his policy was to weaken the great landowners. The courts accordingly recognised and enforced this custom as law, and so the lord of the manor found that his or (more properly) the manor's serfs as they became freemen also became for practical purposes freeholders. A custom in all essentials identical prevailed for several centuries in Ulster. The practical sovereign there, when the custom came before the courts, was the great landowners. The courts accordingly refused to recognise or enforce this custom, and, as far as the law was concerned, the tenant remained in spite of it merely a tenant at will. When the sovereign changed and became not the great landowners but the people, the custom was recognised and enforced through that modern agency—an Act of Parliament.

Mr. Bryce's brilliant criticism of the analytic jurists is but one more evidence of the intellectual reaction against their methods and conclusion which marked the close of the nineteenth century. The causes of this reaction are not very clear. Probably one of them is that the analytic jurists were primarily law reformers, and the reforms they advocated being now largely accomplished, the present generation are less alive to their merits and more keen to their defects than the generation which suffered from the legal abuses they did so much to abolish. Bentham's chief object was to reform the administration of the law. His great instrument in accomplishing this was his doctrine that the principle that should be observed in administering justice was the greatest good of the greatest number.¹ To that doctrine and to his advocacy of specific reforms, the reorganization of courts of Chancery and Common law, the establishment of county courts, the alterations in the law of evidence, and practically every improvement in what Austin calls the adjective law are mainly due. Austin's chief object was to reform the expression of the law. His great instrument in accomplishing this was the doctrine that all law was a command, addressed by the sovereign to the subject. It followed from this doctrine that the law, being a command, should be made as intelligible as possible to the subject who had to obey it. To this principle are largely due the many consolidating or codifying acts which marked the nineteenth century, the statutes simplifying deeds, and the general tendency to rid the law as far as possible of technicalities not understood of the people. While remembering the shortcomings of the analytic jurists—and Mr. Bryce has proved beyond question that their

¹ Mr. Bryce asserts at p. 179, Vol. -II, that the principle of utility has been acknowledged by legislators at all times. No doubt this is accurate; but Bentham's great service was in defining what utility was. Maine testifies eloquently as to the magnitude of that service.

speculations were often unfruitful and their definitions still oftener inadequate or false—we should not forget the great practical services they have rendered to English law.

Historical jurisprudence itself has not been free from errors. To be sure, its influence is only educational: it sets up no principle of legal reform. Sometimes, however, it comes near to doing so. The central doctrine of Maine's *Ancient Law* is, that the line of legal progress is from *status* to contract, and he seems to anticipate a time when all human relations will be controlled by free contract. Probably a more unhappy forecast than this was never made. Ever since *Ancient Law* was published, the tendency of legal change, not merely in England but in every civilized country, has been to restrict the area of free contract. Every day the law is interfering more and more between man and man, and fixing, independently of their individual wishes, the relations that are to subsist between them. We seem to be on the fair way to a time when *status* shall rule again; though that *status* will be one based upon Bentham's principle of the greatest good of the greatest number, and very different from that of the early ages, when the *status* of the greatest number was that they were the chattels of the few.

J. ANDREW STRAHAN.

NOTE.—The custom in Ulster referred to on page 444 is not that commonly called the "Ulster Custom," but an earlier custom by which the descendants of settlers were allowed to hold their father's lands at the same rent from generation to generation.

V.—SECRET COMMISSIONS.

THE standard of respectability "in the City" is undoubtedly the possession of money. So long as a man has the reputation of being rich, no matter how he has become possessed of his riches, or what frauds he perpetrated to get them, he is considered, in a certain set, a highly respectable man. The greater his wealth the greater his respectability. Time and again his methods of making money, which would have brought the blush of shame to the cheeks of an honest man, may have been exposed in the public press, but so long as he has managed to keep out of prison his highly respectable character is maintained. Indeed, the nearer he can sail to the wind in extortion or robbery and get off, the greater the respect he obtains.

On the other hand, the man who refuses to take part in proceedings which his conscience condemns, and who considers honesty and humanity as greater virtues than wealth, is regarded with contempt as a fool. The old saying attributed to a religious sect whose members have been ever foremost in carrying out their principles of peace, simplicity of life and charity, "Make money honestly if thee can, but make money," was more probably the advice given by some City man to his son, and by him fathered on to an innocent sect that he might turn aside suspicion from himself. Men of sterling character who, having ample opportunities to make money in a corrupt manner, and are high-minded enough to act honestly to their fellow men, naturally rely on their rectitude of purpose, but find their reputation besmirched by such hypocrites who are anxious to avoid investigation of their own dishonest acts.

This making of money at any cost is such a predominating object in the life of City men that wealth is considered

certain evidence of a man's capacity. Any fool who is willing to sink honour, good faith and principle, can readily make money, and unfortunately money is more often made in these latter days in this manner than by sound, honest trading. The taking of secret commissions is treated as a venial offence. Corrupt practices are so common that honest Saxon expressions, such as thief and robber, are quite out of date, and more refined slang has been introduced. The thief who is sent to prison "gets into trouble" for having "sneaked a watch." In inventing slang to gloss over his wrong-doing the City man has descended to the level of the thief; when he proposes to rob another by getting him to purchase worthless shares he is said to "unload them"; and if he brings to his assistance the services of a private and intimate friend of the man to be robbed to assist him in the transaction, this friend considers it the proper thing to inquire "Where do I come in?" which means what bribe or secret commission is he to have for inducing his friend to buy a worthless article. Until he gets what he terms his "Commission Note," a document to which he loses no time in having affixed a sixpenny contract stamp, he won't move a step. Should one of these nefarious arrangements be found out, it is politely said of the dishonest scoundrel who proposed to impose on his friend that he "wanted to make a bit." History records that it ever has been the way of the world. Judas Iscariot had some qualms of conscience, as shown by his returning the money, but who has heard of a City merchant returning a secret commission. Can anyone point to his bank book and show that a banker has given him credit for the commission the stock-broker allowed the banker upon investing the customer's money, or even so much as told the customer what the broker did allow him, by making an entry on one side of the customer's pass book, "To services rendered

in instructing stockbroker to buy £10,000 stock," and on the other "By half commission received from stockbroker." It would be perfectly legitimate if he carried out the business in this way, but the matter is treated as a secret agreement between the broker and the banker. Under such circumstances, what is there to prevent the banker claiming such an extortionate share of the broker's commission that the latter makes it up by adding something to the price? The banker, with his expert knowledge, might know that this had been done, but he dare not tell his customer.

When those holding high positions act in this manner, it is only reasonable to find others lower in the social scale following suit. It is a common proceeding in the City, when a man is employed by another to do a certain act—but some one does not want that act done, because it would be to his detriment—for the latter to seek the individual instructed to carry out the act and what is termed "square" him; in plain English, to bribe a servant not to do his duty to his employer. Unfortunately, it is not only the City man who is to blame; it has become such a recognised proceeding, that nothing is to be done except for money, that when complaint was made to a well-known colonel now deceased, the latter replied that he did not come into the City to play at marbles—blunt, but honest from his point of view. Formerly it was said there was honour among thieves, but in these days of education honour has disappeared, and it is far more common in the City to hear the expression, "He would sell his own mother if he had a chance." Of course the verb "sell" is not to be taken in its literal sense, but in its slang meaning, namely, that if he were offered a bribe to do something by which his own mother would be the sufferer, he would accept it.

When the Lord Chancellor and the Lord Chief Justice each bring a Bill into Parliament, having the same object, of making corrupt practices a criminal offence, it is very

clear that these practices have taken such deep root, and form such a cankering sore in society, that stern measures are urgently required to eradicate the evil. After two authorities of such high position have pointed to the black spot, common sense would suppose that our legislators would have lost no time in framing laws to meet the case; but, unfortunately, legislation to stamp out vices at home by which money is made does not find favour. It is far more agreeable to divert attention to another place which produces gold, and throw home requirements to the winds, on the principle that "No man is a prophet in his own country"; hence, both Bills met with the fate of being numbered at the end of the session with the massacred innocents. Votes rule the day, and to obtain these votes the moneyed interest must not be inconvenienced; and this is best effected by smothering home reforms and bringing foreign relations to the fore. No enemies are made thereby by which votes are lost. Now that the war is over it is to be hoped that the matter will not be allowed to sleep. If the House of Commons refuses to do its duty, then let our Peers, whose watchword is supposed to be honour, take the matter in hand as one of "honour." The law regards them as being so immaculate when their honour is at stake, that they are allowed to give their evidence in a court of law, not on oath, but on their honour.

Extensive travel through the United States has resulted in the writer fervently expressing his satisfaction that in this country we have a House of Lords. He never saw its advantage until his experience of the United States forcibly brought it to his notice. In the States it is all "money," there is nothing superior to the "almighty dollar," hence the whole end and aim of everybody is to pile up dollars. With the democratic ideas of the present day are we not trending in the same direction? When first the writer visited the States "tips" were

unknown—there was an independence of character amongst the poorer class which resented the idea of a man being paid to do his duty. With the advent of ostentatious wealth they are now common, but if payment to a man to do his duty is demoralising, how much more so is payment to a man to induce him *not* to do his duty. The two classes of payment are as different in character as that between a simple tumour and a malignant cancer. If our Peers and county families were to “taboo” in society the wealthy parvenu who has amassed gold by unscrupulous methods, or treat the man who takes a secret commission in the same manner as it would a man who is caught cheating at cards, a more healthy condition of business would result in the City.

It is to be hoped that the recent trial exposing share transactions entered into by a “financier” will encourage the Lord Chief Justice in his efforts to weed out corrupt practices. His Lordship’s remark, in his summing up, “Perhaps one advantage of that trial would be that some of the poor fools who speculated on the rise and fall of shares would grow a little bit wiser,” should be instructive. In the course of the trial his Lordship is reported as having observed that, while the parties to the transactions knew all about them, the public (who were to buy the shares) were left in ignorance. Will the public grow wiser? We trow not. They have not the slightest compunction in supporting the most barefaced bribery and corruption, if they fancy they can “make a bit” out of it with safety to themselves. They are as wise in their own conceit now, with all their education, as they were at the time of the South Sea bubble, when it was written—

“A wise man laughed to see an ass
Eat thistles and neglect good grass;
But had the sage beheld the folly
Of late transacted in Change Alley,
He might have seen worse asses there
Give solid gold for empty air.

The headlong fool that wants to be a swopper
Of gold and silver coin for English copper,
May in Change Alley prove himself an ass
And give rich metal for adulterate brass."

A bold thief who robs you in open daylight carries some kind of respect for his proceedings; to get what he wants he boldly risks his liberty, but the canting hypocrites who, under pretence of being your friend, accept pay for assisting others in robbing you, should be treated as vermin and hunted from society. The law, too, should treat them, as it does the secret poisoner, as wholly unworthy of clemency. If society will frown on the man who tempts by offering illicit commissions, and gather up its skirts to prevent contact with him, as being something outside its views of propriety, and legislature makes his secrecy a criminal offence, bribery and corruption in business pursuits will be stamped out equally as effectively as has been done in elections. It will be useless to legislate against the recipients of the secret commission only. Let the man who offers the commission feel he is placing himself in the power of the man to whom it is offered—a being in his inner self he has the utmost contempt for, then he will hesitate to place his liberty at the mercy of an individual for whom he has such contempt.

The Legislature might enact that, to recover commission on any particular transaction, a document in writing should be necessary, and that that writing should state either the amount of the commission, or that it is to be the usual commission allowed in such cases, and that no commission should be recoverable unless it is proved that this document has been produced to the person whom the individual entitled to the commission has induced to transact the business for which the commission note was given. In fact, a disclosure should be required, something akin to that necessary in underwriting shares under sect. 8 of the

Companies Act 1900, and there might be a similar provision exempting the payment of the usual commission or brokerage customarily paid in such transactions, provided the fact of the payment of a commission is stated in any invoice or the like as having been agreed to be made, and the *name* of the person to whom it is paid is disclosed. This would not interfere with the legitimate business of commercial travellers. All that would be necessary would be to state in the invoice: "To goods supplied on order given to our paid representative, Mr. John Smith." In the event of these requirements not being complied with, the provisions introduced into the Companies Act 1867 might be followed, of declaring the contract fraudulent. This would put the briber in a difficulty—he would feel that the man who accepted a bribe from him would as readily accept a counter bribe from the other side to avoid the bargain. It is something too abominable to contemplate that when partaking of the hospitality of your most trusted friend, the well-dressed and apparently well-to-do fellow-guest at your side is so lost to all sense of decency as to recommend you, his host's friend, to purchase a particular brand of wine, because the owners of that brand pay him a secret commission for advertising it; or when he recommends you to invest money in the shares of a company which he states he can get as a favour for you, that he has already made arrangements whereby he has obtained the call of those shares at a much less price than he is offering to get them at for you; or if recommending a stockbroker to make an investment for you, he is being allowed by that broker a share of the brokerage.

Is it not in the power of the Stock Exchange to eradicate that bird of evil omen, "the Stock Exchange runner," by prohibiting its members from sharing commission with anyone not a member of the Exchange, or of admitted provincial Exchanges, in the same manner as

solicitors are not permitted to allow agency to persons who are not solicitors. It would be to the interest of the members themselves to prohibit it. For actual work done no brokerage is earned more easily than that of Stock Exchange brokers. All they have to do is to walk into the Stock Exchange, go up to a jobber and inquire the price of the stock they wish to deal in. He names two prices, one at which he will sell and the other at which he will buy; the broker transacts his business with him at one of these prices, but the transaction is *del credere*, the broker is according to the rules of the Stock Exchange personally liable to the jobber for his principal. His commission, consequently, is based on a scale to provide for this risk, and partakes somewhat of the nature of an insurance premium. If therefore he pays away a considerable portion of this premium, his aggregate fund for the payment of losses through the default of clients is diminished, and the jobber finds only a "lame duck" in the place of a responsible individual. The writer ventures to suggest to the noble Lords who brought the Corrupt Practices Bills into Parliament that, should they re-introduce them, they might assist societies or associations formed to prohibit the payment of secret commissions, by making it a penal offence for any one holding himself out as a member of a society of this character to break its rules, then respectable members who act up to their principles might obtain legal protection. No one could complain of such an enactment; a member need not transact business contrary to the rules of the society he holds himself out as being a member of. If he objects to the rules, he need not belong to the society, and thereby mislead the public that he is governed by rules he does not carry out.

A most pernicious system of commissions has come into existence by advertisements, offering "free gifts" for the sale of worthless articles. There can be no commiseration for

those who send money in response to these advertisements, and propose to act as agents in such cases, and it is a description of swindling very difficult to reach legally; but if respectable newspapers and magazines were to refuse advertisements offering "free gifts," the whole system would break down. Business people do *not* give away something for nothing in return. With brazen impudence the allegation is that the gifts are made as an advertisement. We can understand a gift to the King as an advertisement. The mere fact that the King uses the particular article is sufficient for every fool to desire to use it likewise, whether it is suitable for him or not, and thousands are sold in consequence, but who wants to follow Thomas Smith! It is bad enough to make the offer to grown up people, but when a respectable daily paper inserts an advertisement offering "as a rare chance" every "boy or girl" a "handsome present of two fashionable real 18-carat gold case rings" for selling 24 thimbles for 2d. each, it is time such demoralizing offers should be stopped, and it is to be hoped that the Legislature which has stopped the working man sending his children for the family beer will be equal to the occasion.

The Companies Act 1900, which is supposed to protect investors, requires every prospectus offering the public shares for subscription or purchase, to state the profits of intermediary vendors who get payment out of the issue. The framers of the Act lost sight of the fact that investors rely on the names appearing on the prospectus, so when the name of a high-principled man appears on a prospectus as a director, there is only an indirect protection given to him, and to the public, to prevent his dearest friend who induced him to join the Board receiving a large commission for doing so, by the clauses in section 10 requiring to be stated the amount paid or intended to be paid to any promoter, and the consideration for any such payment, and the dates and parties to every material

contract, and the number of shares or debentures issued for payment, otherwise than in cash; but a premium is held out to secrecy by the section providing that if any matter is not disclosed of which a director or other person was not cognisant, he incurs no responsibility. He might have deputed this dearest friend to make the necessary investigation on his behalf, before allowing his name to go forward, but a direct payment as a bribe given to that friend would be kept secret. In a case of this character, the innocent man who was taken in by the fraud of another's agent suffers, but the principal who appointed the agent gets scot-free. It should be made a criminal offence for payments to be made secretly to induce a man to accept an office, or to do an act, without disclosing to him the fact that such payments have been made or promised. The ramifications—each the subject of a commission note—which frequently pass in forming a board of directors, would surprise those not “in the know,” and in most cases the directors themselves are kept in ignorance, and they ought to be protected as well as the public.

A most dangerous secret commission has of late increased by leaps and bounds, namely, the direct and indirect payments made to journalists to prostitute the independence of the Press. The severest penalty ought to be inflicted, not only on those who dishonour the dignity of a great power of the realm, to which, by its independence in the past, we are greatly indebted, but also on those who tempt others by offering to pay for laudatory articles. To the honour of the Press, the proprietors of our respectably conducted journals do all in their power to protect the public. It is common knowledge that some years since, when it came out in some legal proceedings that the City representative of a leading journal had received benefits from a promoter, it instantly discontinued its separate City office and removed it to its head office where it would have more control. It is useless

to disguise the fact that certain newspapers, apparently of a high-class character, do use their columns for the purpose of assisting in the promotion of companies or the unloading of shares, and many of a lower type are only carried on with that object. These, while professing to expose fraud, select undertakings for attack with which they are unconnected, and thus seek to lead the public to believe they are independent. By this means, when it is desirable to assist a company in which the owners of the newspaper, their friends or connections, are interested, their praise has the weight of independent criticism. Those investing capital, led away by their own greed, will swallow any lie as to enormous profits, but let a little spicy article, amounting to nothing, appear respecting an honestly conducted company, they will not take the trouble to dissect its worthless criticism, hence the power of the Press in all financial matters is enormous—straws show the way the wind blows, and it is edifying to note how professional promoters bloom into newspaper proprietors. It is instructive, also, to compare the length of the advertisement with the praise of the article.

But the most dangerous secret arrangement is one wholly independent of the advertisement. A writer or editor is given the call of shares at a price less than that quoted when the promoters are "making a market." The consequence is, this market price, which in nine cases out of ten is purely fictitious, is duly announced from time to time in the paper, as it has become the interest of the editor or writer to delude the public into buying, that he might exercise his call and make a profit on it. It has been rumoured that newspaper proprietors, having obtained a call from the promoter, have forthwith sold on the market at the fictitious price, thereby making it incumbent on the promoter himself to buy back the shares, and thus personally put into the editor's pocket in cash the difference between the call price and selling price. Unfortunately, City morals

have become so lax that no slur is cast upon the character of those who get business by wholesale bribery—the principle that “all is fair in love and war” dominates.

An undischarged bankrupt, obtaining credit without disclosing the fact that he has not obtained his discharge, commits a criminal offence for which the Legislature has provided a summary proceeding before a magistrate. The Companies Act requires directors offering shares to the public for subscription or purchase, to state in the prospectus or advertisement “the nature and extent of the interest of every director,” but provides no summary proceeding for default. In any future Bill to stop corrupt practices, a clause should be introduced enacting that any person having a statutory duty imposed on him to disclose a particular fact to another, failing to disclose that fact, shall be liable to be proceeded against summarily. There is nothing improper in many things if they are done openly—the essence of impropriety consists in withholding information. There is nothing wrong in paying an agent to obtain a purchaser, provided the purchaser is made aware that he is dealing with a paid agent. That a necessity for disclosing that large payments are made for commission to carry through business, if the parties think well of the transaction although the commission may be enormous, does not prevent the transaction of business, is amply proved by recorded transactions. Hooley, when he promoted the Dunlop Tyre Company, made no secret that two millions out of five went into somebody's pocket for arranging the transaction; yet the public not only subscribed the capital, but actually paid 34s. for each £1 share, which represented this profit of two millions. Again, after the passing of the Companies Act 1900, a certain prospectus told intending investors that the Company intended buying for £250,000 a property which had been bought fifteen days previously for £20,000, yet a leading financial journal stated in its news columns that

"The issue is reported to have met with a good reception, and it is stated that applications have already been made on so large a scale that the lists may close to-night." In another it was boldly stated in the prospectus that a lease was bought for £8,000 and sold the next day for £75,000, and resold the same day for £200,000, and yet the shares were quoted at a premium; and six weeks after, still giving the information as to the original price of the lease, viz. £8,000, one of the two properties included in it was sold for £100,000. In a still later case, an option to buy a property for £1,000 cash and 6,000 fully paid shares having been obtained, the property was, without anything whatever having been apparently done to improve it, sold by the assignee of the option within three months thereafter for £5,000 in cash and 500,000 shares. All the facts were openly disclosed in the prospectus, which also revealed that gentlemen, apparently members of the Stock Exchange and consequently astute men of business, were concerned in the purchase. These examples show that there is absolutely no necessity for secrecy in disposing of property to the public, and that even the disclosure of enormous commissions will not prevent business with the gullible public.

ANTHONY PULBROOK.

VI.—A GENERAL ARBITRATION TREATY BETWEEN ENGLAND AND FRANCE.

THE proposal for a general Arbitration Treaty between Great Britain and France, made by Mr. Thomas Barclay in the *Fortnightly Review* of June 1901, has now secured sufficient support from public opinion in both countries to encourage the hope that it may receive serious consideration as a practical measure at the hands of the two Governments. Resolutions in its favour have been cordially

adopted at meetings of lawyers and business men, such as the Conference of the International Law Association at Glasgow last August, where it received the warm approval of the present Lord Chief Justice of England; and the meeting at Nottingham of the Associated Chambers of Commerce representing seventy-six British Chambers of Commerce, besides others which have since expressed opinions in its favour. In France numerous Chambers of Commerce and Municipal Councils have cordially welcomed the idea; and in both countries leading public men and lawyers have added their testimony to the value of the proposal if it can be put in practice. After this approval of the principle, the next step is to consider what form of treaty will be most likely to give practical results.

It is hardly perhaps necessary now to say that the principle of permanent arbitration treaties has been recognised as a practical development of International law by almost all civilized States. The Senate and House of Representatives in the United States in 1890, the French Chamber of Deputies in 1895, and the British House of Commons in 1893, have all expressed their opinion to this effect: and treaties for that object between particular nations have been drafted or signed (though none yet ratified), such as that between Switzerland and the United States in 1883, the Pan-American treaty of 1890, the Olney-Pauncefote treaty for Great Britain and the United States in 1897, and that between Italy and Argentina in 1898. The failure of these treaties to take effect has not prevented the very recent signature of a treaty of obligatory general arbitration between Spain and nine South American States, to which the accession of four more may be expected, and for which it is to be hoped that ratification will in due course be forthcoming.

The determining features of such a treaty must necessarily be (1) the subjects on which the contracting Powers agree

to arbitrate; and (2) the constitution of the tribunal of arbitration. To these may be added (3) the special principles, if any, which are to guide the arbitrators in forming their decision; but if none such are expressed, it may be assumed, as in the Anglo-American treaty, that the ordinary rules of International law are to be applied. The diversity of the former treaties on these points show that they are felt to be the real difficulties in practice.

The projected Swiss-American treaty submitted "all difficulties" arising during the thirty years' duration of the treaty to the arbitration of three persons, each party choosing one who was to be neither a citizen nor an inhabitant of its own, and these two were to choose a third, or failing their agreement, a neutral government chosen by agreement or by lot was to do so. The Pan-American treaty similarly extended to all subjects, specially mentioning controversies concerning diplomatic and consular privileges, boundaries, territories, indemnities, right of navigation, and validity, construction, and enforcement of treaties, except such as might in the judgment of a signatory engaged in controversy imperil its independence, when arbitration was to be optional for it, but obligatory for the adversary power. The Anglo-American treaty provided for arbitration on all questions of difference which diplomacy failed to settle, but distinguished three classes of cases: for pecuniary claims not exceeding £100,000 and involving no territorial claim, each party was to appoint an arbitrator, and the arbitrators an umpire; failing their agreement, the umpire was to be chosen by agreement between the Judicial Committee of the Privy Council and the United States Supreme Court, and failing that, by the King of Sweden and Norway, and the decision of the majority was to be final: for pecuniary claims exceeding £100,000 and all other questions involving treaty rights and others, but not territorial claims, the same tribunal was to decide, and its decision, if unanimous, was to

be final; otherwise it was to be subject to an appeal before a tribunal of five, each party appointing two arbitrators, and an umpire chosen as above, and the decision of the majority to be final: for questions of territorial claims the tribunal was composed of three judges of the Superior Courts of the United States and three judges of those of Great Britain, and their award, if by a majority of five to one, was to be final; if by a smaller majority, it was only to be final if not protested against, and in this case, or in case of equal decision, no hostile measures were to be taken till resort had been had to the mediation of neutral Powers. The treaty was to be in force for five years. The Italo-Argentine treaty similarly extended to all disputes, the point in dispute to be fixed by a special convention, or failing that, by the arbitral tribunal, which was to consist of two arbitrators, one named by each party, but who must not be a citizen or resident of its own, and a third agreed upon by the others, or failing their agreement, by the Swiss President and the King of Sweden and Norway in turns: the tribunal was to decide according to the principles of International law, "unless the compromise provides for the application of special rules, or authorises the arbitrators to render their decision as friendly counsellors." The recent treaties between Spain and the South American States exclude expressly from arbitration any differences which "might prejudice the independence or national honour of one of the parties."

As a precedent for the proposed treaty it is only natural to expect that British statesmen will in the first place turn to the Anglo-American treaty, which, with regard to the two points mentioned above, applies the principle of compulsory arbitration to every cause of difference between the two nations which cannot be adjusted diplomatically, but restricts the choice of arbitrators with regard to territorial claims exclusively to subjects of the two con-

tracting States. The very comprehensiveness of the first of these, if theoretically correct, in practice seems to create a difficulty, judging from the fact that no treaty with so wide an application has yet become an accomplished fact in diplomacy by ratification, and there seems ground for thinking that this characteristic proved fatal to the Olney-Pauncefote treaty; while it is significant that the recent treaties between Spain and the South American States exclude cases affecting the independence and national honour of one of the parties. But it may fairly be urged that this comprehensiveness is considerably qualified by the provision of the treaty with regard to the second point. Inversely this, if theoretically incorrect on the ground that the tribunal would not then be independent of any leaning to either disputant, has the justification of being and likely to make the treaty more workable in practice. The probable reason for its adoption is, no doubt, that given by Mr. Barclay. In his words, "the idea which had prevailed until this treaty in the constituting of courts of arbitration was that the arbitrator or umpire, if more than one, should be a person who, by his independence and entire detachment from the interests involved, had the impartiality necessary for the pure and simple application of principles of justice. The object was to apply to nations the same principles as regulate litigation between citizens. The assimilation is practical enough for the questions of indemnity which are the most common. In these there is no difficulty in following the example of national courts. Questions of this kind, however, seldom assume such proportions as to become a menace to peace, and it is only reasonable that the parties should refer them to persons of independent nationality as the most likely to take an unprejudiced view, independence being for this kind of question the essential point. The fact that they have no responsibility for the consequences of their award

renders them so much the more capable of balancing the strict rights of the one against the other. - But there are many considerations and motives which influence nations of which no court of justice could take account. What judges, according to the ordinary principles of justice, for instance, can take into account the *amour propre* of a litigant, an overwhelming interest, a *fait accompli*, the necessity of territorial expansion, a sphere of legitimate influence, or the balance of power? It is questions of this kind, and not purely material questions such as ordinary tribunals have to deal with, that precipitate war. In these, the principles of justice, pure and simple, play only a secondary part. Independence and its corollary, the absence of all responsibility, which are indispensable to the determination of disputes between ordinary litigants, render the usual kind of arbitration inapplicable to the very questions which are most likely to plunge nations into war. This consideration doubtless struck the negotiators of this treaty, as also must have the success with which the diverse Anglo-American, Anglo-German, and Anglo-French mixed commissions had been able to perform their duties without agitation, or even public attention in the countries interested. They probably came to the conclusion that no State would ever barter away its right of self-preservation, and that the substitution of arbitration for war as the last word among nations must be put aside as an empty dream; and consequently limited their efforts to the creation of an automatic system calculated to remove questions between two States for irritating discussion by irresponsible politicians and writers, who cannot be sufficiently conversant with the facts to deal efficiently with them, hoping thereby to delay or calm explosions of public opinion, which are the real danger to peace, and to arrest the development of those vague hatreds created by prejudice or ignorance which grow, no one knows how, and soon break away from their initial cause."

It may be objected that these are not arbitrations proper at all, but more of the nature of mixed commissions, and that the duties of the arbitrators would be more diplomatic than judicial; but it must be remembered that the compulsory reference to arbitration of all causes of difference is an invasion of the sphere of international diplomacy by International law, for the success of which allowance must be made for political considerations and national feelings. Moreover, in the ordinary optional international arbitrations, it has become the rule for each party to the dispute to have a representative on the tribunal as well as advocates before it, and this has the advantage that thereby the litigant nation or government, against whom judgment is given, is made itself a party to that judgment, and more willingly accepts a decision which a jurist of its own, standing wholly detached from the view of its executive and administrative government, either concurs in or has had full opportunity of criticising and testing. There are no doubt special connections of kinship and policy between Great Britain and the United States, which should make a treaty in the form of the Anglo-American one more likely to be successful than one between ourselves and any other nation. The mutual boundaries of American and British national policy are, it is to be hoped, fixed permanently. American and English judges, perhaps pre-eminently over those of other nations, occupy a position in their respective countries wholly independent of the executive, which enables them to take views unbiassed by political or national considerations; and the judicial instinct of the two countries is sufficiently developed to ensure the loyal acceptance of arbitral decisions affecting their mutual rights. France has, however, always been pre-eminent for scientific knowledge and application of the principles of International law, public or private; and the comprehensive scheme of arrangements as to mutual spheres of influence which Lord Salisbury has

carried into effect with various French foreign ministers at our several points of contact in Africa and Asia, should have rendered the occasions for differences on political questions of unlikely occurrence. The only immediate outstanding difficulty with France is that of the French shore in Newfoundland, the legal question in which is the extent of the French rights under treaty, one for which the decision of a tribunal of French and English representative jurists would be as internationally satisfactory as was the unanimous decision of the American and British representatives in the Venezuela arbitration. Such a tribunal as that proposed would be practically a permanent mixed commission, which would not be bound like an independent tribunal to give judgment according to the strict rights of the parties, but could compromise and give due weight to the political considerations which cannot be disregarded in territorial questions.

The objection that such a treaty infringes the principle of permanent general arbitration established by the Hague Convention, is dealt with by Mr. Barclay in the letter which follows; but a significant proof of the opinion of that great Conference as to the mutual limits of the principle of general optional arbitration on the one hand, and that of particular obligatory arbitration on the other, is to be found not only in the express words of Article 19 of the Convention, but in the proceedings which led to the adoption of that Article in substitution for the proposal for obligatory arbitration, limited or unlimited, contained in the project of the Russian delegates. To sum up, on the whole, the argument from experience seems to favour a treaty on the lines of the Anglo-American one, but simpler in form, with an exclusion of causes affecting national independence or dignity, and an express mention, as in causes of difference like the Pan-American one, of the cases to which it is to apply.

G. G. PHILLIMORE.

To the Editor.

SIR,—My attention has been called to a suggestion that the present agitation for a permanent treaty of arbitration between Great Britain and France is prejudicial to the Hague Court, and detracts from the moral obligation undertaken by the powers to utilise it wherever possible.

Such an idea shows a total misconception of the nature of the present movement.

The Hague Convention is elaborate in its provisions to make perfectly clear that reference to the court is not compulsory.

If there were any chance of Great Britain, France, the United States, Germany, or any other great Power agreeing to bind itself to the acceptance of arbitration, in the ordinary sense of the word, where matters of vital interest were involved (that is, the cases in which war is most likely to break out), agitating the Powers to give a compulsory character to the Hague Convention might eventually be successful, and for my own part I do not see why agitators should not go on so urging them. But surely it is not proposed that we should confine our hopes of diminishing the chances of war between any two countries, to a particular method which they have hitherto absolutely refused to entertain.

Now the Anglo-American Treaty was specially framed to meet the objections to arbitration in the ordinary sense of the word. In cases of difference between the two countries in question involving the "determination of territorial claims" or "matters of principle and grave general importance affecting national rights," provision was made to dispense with the presence of an umpire, who is necessarily a foreigner to both litigants. Reluctance to confide the decision of any vital question to a foreigner is the point which has always stood in the way of any great nation accepting arbitration on matters of great gravity. A self-governing people wishes to know that the men to whom the final decision of its material interests is committed have them at heart, and that they will not part with anything essential to the national prosperity purely upon grounds of absolute justice.

The Anglo-American Treaty, in order to meet the objection, provided that the cases above referred to should be dealt with by a Joint Commission composed of six professional judges, half of them English and half of them American, without an umpire, and, to make sure that the decision should not depend on one English

member, it was provided that the decision of a bare majority was to be conclusive only if not protested against within a certain period. A majority of five to one—that is two English or two American judges—siding with the adversary was to be final.

The idea of the negotiators was to get as near arbitration as possible, but in any case to throw as many difficulties in the way of war as they could. As President Cleveland said of this provision, "It is apparent that the treaty which has been formulated not only makes war between the two parties to it a remote possibility, but precludes those fears and rumours of war which, of themselves, too often assume the proportions of a national disaster."

A treaty similar to the Anglo-American one can work perfectly well alongside the Hague Tribunal, without in the least encroaching on its sphere of influence. And so far am I from wishing to interfere with the admirable work the Hague Court is capable of doing, that I do not see how the French and English diplomatists who, I hope, will soon be entrusted with the negotiation of a treaty for which public opinion on both sides of the Channel has shown itself to be ripe, can settle its terms without taking the Hague Convention into account. As between England and France they would probably propose to make reference to the Hague Court compulsory in the cases for which it is adapted, and merely graft upon it separate provisions for cases to which it is not thought to be adapted.

In short, far from being prejudicial to the success of the Hague Court, the projected treaty would probably be the first step to giving it that compulsory character which it lacks.

Believe me, yours faithfully,

THOMAS BARCLAY.

17, Rue Pasquier, Paris.

July, 1902.

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

The Settlement in South Africa.

SOME of the credit for the attainment of peace in South Africa, at least in the eyes of international lawyers, is due to the timely suggestion of the Dutch Government to

our own, to allow communications, with a view to peace terms, to pass between the Boer forces in the field and the Boer delegates in Europe. Although, in view of the fact that the Boer States Executive was in South Africa, and the delegates in Europe had no power of treating, the suggestion was necessarily refused, it afforded an opportunity for our Government to express its willingness to discuss terms of peace with the recognised Boer authorities, and its communication to the Boers by Lord Kitchener was followed almost immediately by their expressing a wish to treat. International mediation is always a matter of difficulty and delicacy, however indirectly put forward, but the peculiar historical connection of Holland with South Africa, and her position in public International law re-asserted under the Hague Peace Convention (which it will be remembered affirmed the lawfulness of mediation for its signatories), pointed to her as the most appropriate author for the suggestion.

The treaty of peace, expressed to be made between representatives of the British Government on the one hand, and the two Boer States on the other, and providing for the surrender of the burgher forces and their recognition of the sovereignty of the British Crown on stated conditions, constitutes a declaration by the admitted executive and military authorities of those States, that their incorporation into the British dominions is *de jure* as well as *de facto*, which third parties are bound to recognise. The simultaneousness and completeness with which the surrender has been carried out are additional evidence of the advantage of dealing with the hostile forces as a political organisation as well as a military one. The nature of the terms are, perhaps, most succinctly described in the official instructions sent to Lord Kitchener, as being on the lines of those communicated to General Botha in March 1901. This impliedly involved the with-

drawal of the proclamation of August 1901, declaring the banishment of the Boer leaders still in the field, which has been carried out, and it is to be hoped that a similar course will be followed with the proclamation relating to the forced sale of farms. The liberality of the terms generally should secure a fair start for the new political situation in the incorporated territories; and particular instances of this, so far as international practice is concerned, are to be found in the inclusion of claims for requisitions made by the Boer military authorities during the war among those entitled to share in the three million pounds allotted by the British Government as compensation for losses by the war; in the assurance that no special tax will be imposed on landed property in the late Boer States for the expenses of the war; and in the practical amnesty which British subjects who took up arms for the Boers can secure for themselves by surrendering in the new territories, although the mild punishments for treason announced in Cape Colony and Natal are not likely to deter offenders from returning there. Our own government, as was only to be expected, now assumes responsibility for the national debts of the former States; and it is similarly announced that the transfer of the districts of Utrecht and Vryheid from the Transvaal to Natal will be accompanied with a transfer of a corresponding proportion of the Transvaal debt.

The war, in spite of its duration of nearly three years, cannot be said to have produced any new results in International law. But as regards neutrals, the American doctrine of "continuous voyages" may now be assumed to have received the adhesion of Great Britain and Germany, as a result of their diplomatic correspondence respecting the seizure of the mail steamers *Bundesrath* and *Herzog* (see these Notes, Vol. XXV, Nos. 231, 347); and Lord

Salisbury's consent to the limitation of the right of search to a certain distance from the area of hostilities, and not being made on suspicion only, will form a precedent to be invoked in the future. As regards the belligerents, the war has chiefly furnished illustrations of what will constitute such "effective occupation" of a hostile territory under modern conditions, as will give an occupying enemy the right to enforce severer measures than the ordinary belligerent ones, against the persons and property of the native forces still continuing their resistance. Guerilla warfare by irregular forces is no doubt an irritating form of resistance in face of a greatly superior regular force. The Duke of Wellington, in the early stages of the Peninsular war, had to vindicate, by formal protest, the right of the irregular Spanish forces to treatment as belligerents from the French army which occupied Spain; and in the Franco-German war severe measures were applied to warfare by *franc-tireurs*. But international opinion has since made considerable progress, and has declared, both at Brussels in 1874 and at the Hague in 1899, in favour of the rights of the *levée en masse* of a country not "occupied," and against the punishment of inhabitants of districts by fine or otherwise for acts of war committed within their area. The general recognition by our military authorities of the Boer forces as belligerents throughout has been justified by their numbers and organisation as revealed by the recent surrenders, and these figures seem to point to very little effect having been produced on the quality of the resistance by the proclamations above referred to.

The Cuban Republic.

The Government of the United States have redeemed the pledge which they gave at the beginning of their war with Spain in 1898, with the object of freeing Cuba from Spanish rule, that they would grant the island self-government at the

earliest possible opportunity; and it remains to be seen whether the Cubans possess sufficient national sentiment and political capacity to stand alone. The United States exercise a virtual protectorate over the island, but the only express restrictions imposed on it by its constitution are exclusion from entering into relations with foreign States, and prohibition against assuming liability for the debts of Cuba under Spanish rule. Cuba is thus made a semi-sovereign State, occupying a very similar position to that of the Ionian Islands when under the protection of Great Britain. Their position, as determined by the Treaty of Paris in 1815, was declared to be that of a "single free and independent State," regulating their own internal organisation with the approbation of the protecting power, which was represented by a resident High Commissioner and exercised military control over the islands; their trading flag was acknowledged as the flag of a free independent State, and their foreign relations were placed in the hands of the protecting power. During the Crimean war Ionian ships were held in the British prize court not to be affected by the relations between Great Britain and Russia, and to be entitled to continue trading with Russia. The question of the liability of a new State for the debts of its predecessor has already been considered in these notes (Vol. XXV, p. 92); and it seems that under present circumstances no recourse can be had to Cuba or the United States.

Private International Law in South America.

In the last number of the *Revue Générale de droit International Publique*, attention has been drawn by M. Prudhomme, professor at Lille, to the rapprochement which has lately taken place in legal conceptions (*inter alia*) between the South American States and Spain, and the consequent holding of a Conference in 1900 at Madrid, between jurists

representative of Spain and fifteen central and South American States, which discussed and approved of the propositions of private International law adopted at a congress at Monte Video in 1889, and embodied in a treaty between Argentina, Bolivia, Paraguay, Peru, and Uruguay. Apart from the historical interest of this desire on the part of Spain, and the former Spanish Colonies in South America, to adopt common rules in questions involving the mutual rights of their subjects—a fact which we may hope has its parallel in a similar feeling between the United States and ourselves—a question of practical interest arises from the fact that Spain was a member of the Hague Conferences on private International law in 1893 and 1894, which reflected the views of jurists of fifteen European states, and the resolutions of which are not by any means identical with the views expressed at Madrid, for example those with regard to an International law of marriage and succession.

Generally it may be said that the governing law on these points, according to the view at the Hague Conference, is the law of nationality; according to the Madrid Conference the law of domicile; and these are their respective standards in questions of capacity generally, rights and duties of spouses and separation, minority, tutorship and curatorship, while for the formalities of marriage both systems agree in adopting the *lex loci celebrationis*. But there are exceptions to this general rule in the Madrid propositions; notably the provision that the capacity to contract marriage should be determined by the *lex loci celebrationis*, subject to the provision that a marriage in one State need not be recognized in another if the parties are under age (14 and 12), or there is an impediment of legal or natural relationship between them, &c. On this point the Hague view makes the law of the parties' nationality decisive, subject however to the requirements of the *lex domicilii* or the *lex loci*

celebrationis, so far as the national law admits. As regards dissolution of marriage, the Madrid system makes the law of the domicile govern, provided that the cause is one admissible for that purpose by the *lex loci celebrationis*, while the Hague one allows it only where the national law and the *lex fori* admit. The questions of the legitimacy and subsequent legitimation of children similarly follow the respective standards of the *lex loci celebrationis* and the national law. The adoption by the Madrid jurists of the *lex loci celebrationis* in these particular cases is perhaps due to the fact that the South American nations are generally of one race and have similar systems of law, and nationality does not appeal to them as it does to older nations anxious to retain their particular systems; and this was the earlier view in England and in the United States, our present preference for the law of the domicile being of quite modern date. The provision of the Madrid system relating to succession, that property moveable or immoveable is to be governed by the *lex rei sitæ* as regards quality, possession and alienability, and that the *lex rei sitæ* at the time of the decease of the *de cuius* shall regulate the succession thereto, whether testamentary or intestate, is open to more question; and M. Prudhomme points out that it is not in accordance with the other provisions of the system making the *lex domicilii* the governing law, or with the general principle that all the property of a deceased shall be regarded as a whole governed by one law. The Hague system applies the national law to succession, testamentary power, and capacity for succession, but as regards form, either the national law or the law of the country where disposal is made, provided that express requirements of the former are fulfilled.

In connection with these views as to an international marriage law two recent cases in our courts require notice.

In *Lightbody v. West* (18 T. L. R. 526, April 19th last) the validity of a marriage in Argentina between two British subjects—the husband being domiciled there, and belonging to the Church of England, and the wife belonging to the Episcopalian Methodists—celebrated by a minister of the latter body, according to its form of service (which, however, is identical with that of the former), was set up by the wife, claiming letters of administration to her husband's property here. No civil marriage was then allowed in Argentina, and no ordained minister could be procured, and the Argentine code provides that in the case of Catholics the Roman Catholic ritual is to be followed, and that marriages solemnized without the sanction of the Roman Church, between Christians not Catholics or non-Christians, produce in Argentina all the civil effects of a valid marriage if solemnized "in accordance with the laws of that code or the laws and rites of the church to which the parties belong." An Argentine lawyer explained this to mean that the code only discriminated between Roman Catholics and non-Roman Catholics, and not between churches of non-Catholics, and only one ceremony was necessary; and the Argentine court had granted the wife a decree, recognising the succession of herself and her son to the property there. Our own court held that the marriage was valid according to Argentine law, and that it was not necessary to decide whether it was also good according to the laws and rites of the Church of England: but it threw out the suggestion that the rule laid down in *R. v. Millis* (that a marriage at Common law requires the presence of an ordained minister) was due to a requirement of State and not Church law, and that as the Common and Civil law of Western Europe considered a marriage *per verba de presenti* valid without the presence of an ordained minister, such a marriage might be in accordance with the laws and rites of the Church of England: but that at all events that rule did not apply where no ordained

minister could be obtained. The decision in *R. v. Millis* (if the result of an equal division of opinion in the court can be properly so called) has undergone so much criticism at the hands of our own ecclesiastical lawyers, as well as in the United States and Canada (Dicey, 634-648), that there seems to be good reason for confining its effect in our own courts within as narrow limits as possible.

In *In re Bankes* (Weekly Notes of June 28th last) the question was raised of the validity and construction of a marriage settlement made in Italy, between a widow domiciled in England and an officer in the Italian Army, with a covenant by the wife to settle after-acquired property during marriage. The settlement was drawn in the English form, and was valid only by English law, the Italian law requiring that it should be made before a notary public as altering the rights of succession; and the trust funds were invested in an English mortgage, and when realised it was provided that they should be settled in English securities. The marriage took place, and twenty years after, a voluntary separation was agreed upon between the parties, which was approved of by an Italian court. The court decided that bequests made to the wife by her parents, and taking effect after the separation, were caught by the covenant in the settlement, on the ground that by Italian law the separation did not make her a *feme sole*, or affect the property any more than the marriage did; and that the parties intended English law to govern their express contract, which otherwise would have been invalid, although the matrimonial domicile was Italian. This is in accordance with the general rule; but if there is no evidence of such an intention to adopt a law other than that of the husband's domicile, this latter will govern (Dicey, 648, 653). Even in cases where parties marrying have made no express contract with regard to their mutual

rights of property, our courts will infer an intention to adopt the law of the matrimonial domicile as governing all present and future property acquired during the marriage, even though their domicile be changed, and the property acquired after that change of domicile includes land situate in the country of the new domicile, which under ordinary circumstances would be subject to the *lex situs* (*De Nicols v. Curlier*, L. R. [1900], A. C. 21 ; L. R. [1900], 2 Ch. 410), a principle which may directly affect the succession to English land. It may be noticed in this connection that the Madrid Conference above referred to was of opinion that, in the absence of contract, the law of the domicile chosen by the parties before celebration of the marriage shall govern their property during marriage, or failing that, the law of the personal domicile of the husband at the time of the marriage in everything not contrary to the law of the place where the property is situate.

Bearer Bonds.

By a recent decision (*Edelstein v. Schuler & Co.*, L. R. [1902], 2 K. B. 144), following another to the same effect (*Bechuanaland Exploration Co. v. London Trading Bank*, L. R. [1898], 2 Q. B. 658), debenture bonds payable to bearer, whether issued by English companies in England or by foreign companies abroad, have been declared to be negotiable instruments transferable by mere delivery, which our courts will recognise as such, without requiring evidence of mercantile custom to that effect, and will not allow the real owner to reclaim from the person who has given value for them in good faith ; and conformably with this it would also seem that a person who has sold them in good faith for an apparent owner, though he is not a holder for value, incurs no liability to the real owner. Our law has recognised this quality in the case of bonds of foreign and colonial governments and companies so long as eighty years ago, on the

ground of custom; but the decision in *Crouch v. Crédit Foncier of England* in 1873 (L. R., 8 Q. B. 374) had declared that, in the case of English instruments, custom could not make them negotiable, and this proposition has now for the first time been definitely rejected. These decisions are important internationally, as bringing our law into harmony with foreign systems of law which have long recognised this quality of bearer bonds of all kinds, and with the general business practice.

The desirability of uniformity in the various legal systems on this head was pointed out at meetings of jurists, notably so long ago as 1878—1881, at conferences of the International Law Association, at which the attitude of our courts in maintaining that “a floating debt to bearer was unknown to English jurisprudence” was adversely criticised; and a series of resolutions was adopted at Cologne in 1881,^c embodying the legal conditions which it was thought should be uniformly fulfilled by all securities of this kind. Their effect was that every bearer bond (the German *inhaberpapier*) should be registered in a public registry with all the conditions of its issue, which conditions should also be indicated in the instrument itself; that its operation should begin from the time of its leaving the hands of the person issuing it, whether with or without his consent, and should continue in spite of his death or incapacity for business: that at the option and expense of the holder the instrument should be convertible by the person issuing it into a nominative one, and *vice versa*, thus restricting its negotiability, but not otherwise: that the title to the instrument of a *bonâ fide* holder should not be affected by any prior equities, and he could hold it against all persons whatever: and lastly, that no action upon a coupon or warrant should be brought after six years after the day on which interest falls due, nor upon the bond itself after

thirty years after the date of its falling due. Our own law seems to be in accordance with these requirements, except that its period of limitation of actions on the bond is twenty instead of thirty years.

Service out of the Jurisdiction.

An instance of perhaps an extreme exercise of jurisdiction, because affecting land situate out of the jurisdiction, is afforded by *Duder v. Amsterdamsch Trustees Kantoor* ([1902], 2 Ch. 132). An action was brought by a Brazilian firm, one member of which was temporarily resident in England, to enforce a prior equitable charge made in England upon land and personal property situate in Brazil, and the defendants were a Dutch Company having no place of business here (who were the trustees of a debenture deed relating to that foreign property), the receivers appointed under that deed who were resident in England, and an English Company owning the property in question. The Dutch corporation appeared under protest, objecting to the jurisdiction, but the court over-ruled their protest, appointed a receiver of the property, and allowed notice of the writ to be served out of the jurisdiction on the corporation on the ground that the court had jurisdiction over a contract made between persons here with regard to land abroad as much as if it were land here, and that some of the defendants being within the jurisdiction the corporation could be brought in as a proper party to the action. The decision itself does not go beyond previous authority, for in *Bawtree v. Great N. W. Central Railway Co.* (14 T. L. R. 448), where the holder of a bond issued here by a Canadian railway company claimed by action here the benefit of a charge given by that company to other parties on land and other property in Canada, and although the validity of the title to the land was being litigated in the Canadian Courts, leave was granted

to bring the company into the action here, on the ground that the contract was made in England and intended to be governed by English law and there were defendants resident here. Similarly, the presence of a defendant in England has been held to give jurisdiction over others resident abroad, on a contract relating to land in Trinidad (*Jenney v. Mackintosh*, 33 Ch. D. 595). This proceeding would not have been possible before the present rules of procedure came into force: but the court in the present case was of opinion that its action was not an extension of jurisdiction, but merely an enabling the exercise of the jurisdiction of the Court of Chancery *in personam*, where formerly defective rules of procedure prevented it.

The extent of this jurisdiction underwent considerable discussion in the *Companhia de Moçambique v. British South Africa Co.* case (L. R. [1892], 2 Q. B. 358; L. R. [1893], A. C. 602), in which it was laid down that these rules of procedure must not be construed so as to give any new jurisdiction to our courts. Lord Halsbury declared that "rules of procedure and practice would not, in the contemplation of anyone, touch questions of territorial and international jurisdiction"; and Lord Herschell, while expressing the view that "if the courts of a country were to claim, as against a person resident in it, jurisdiction to adjudicate upon the title to land in a foreign country, it is by no means certain that any rule of International law would be violated," also cited the opinion of Story that "this doctrine of the English Court of Chancery, in questions relating to foreign land, seemed carried to an extent which may perhaps in some cases not find a perfect warrant in general principles of International law, and therefore it must have a very uncertain basis as to its recognition in foreign countries, so far as it may be supposed to be founded on the comity of nations" (ss. 544, 545). In

this same passage Story notes that it had repeatedly been laid down by the Court, in very general terms, that there was no doubt of the jurisdiction of the court as to land in the West Indies, or in other foreign countries, if the persons are in England. Dicey similarly states it as an exception to the rule of the English courts having no jurisdiction to determine the title to or possession of land abroad, or to give damages for trespass to such land, that they have jurisdiction to entertain actions against a person in England with regard to such land on the ground of contract or equity (pp. 214-6). These recent decisions seem to go further than the former authorities, which made personal residence of a defendant within the jurisdiction a condition precedent to exercising jurisdiction over him in such questions; the other rules of procedure on this subject (Order XI) only mention expressly in this connection land within English jurisdiction; and it is possible that the decision of a court of one country affecting land within the jurisdiction of another country might well be refused any effectiveness there.

In *Anger v. Vasnier* (18 T. L. R. 596) an application was made for leave to serve notice of writ out of the jurisdiction on a person who was not a British subject and was living in France, for breach of a contract to satisfy the claims of the plaintiff against a French company, in consideration of his withdrawing his action against them; but according to the now established rule of our courts it was held that, as the contract did not provide expressly that the payment *must* be made in England, there was no breach of a contract, which "according to the terms thereof ought to be performed within the jurisdiction;" and the ordinary rule of English law, that a debtor is bound to seek out his creditor and make payment when he finds him, is not enough to give this right under the words of the rule.

G. G. PHILLIMORE.

VIII.—NOTES ON RECENT CASES (ENGLISH).

UNDER the title *Leigh v. Taylor* (L. R. [1902], A. C. 157) the House of Lords has affirmed the judgment of the Court of Appeal in *Re de Falbe* (L. R. [1901], 1 Ch. 523). It will be remembered that the Court of Appeal, reversing the decision of Byrne, J., held that the tapestry which the life tenant (Madame de Falbe) had affixed to the walls of the mansion house of the settled land passed to her executor, and not to the remainderman. The most remarkable point about the House of Lords' decision is the fact that the Lord Chancellor seems to dissent from what was admitted in the Court of Appeal—that the law as to fixtures has steadily and greatly altered within recent times. His Lordship seems to say that the law has not, but that people's modes of life have altered, and that the apparent alteration of the law is merely its application under the new circumstances. If his Lordship had said that the political importance of certain classes of people had altered, and that in consequence the application of the law of fixtures had also altered to suit their interests, he would have, it is submitted, been nearer the mark. No instance could be better than the law of fixtures for illustrating the tendency of the courts to protect the property of those who hold political power in the State. When the landowners were the "predominant partner" in the constitution, the old rule *Quicquid plantatur solo, solo cedit* was rigidly applied (per Martin, B., in *Elliott v. Bishop*, 10 Ex. 496, at p. 507). When the trading classes became powerful, an exception to this rule was made in favour of trade fixtures (*Lawton v. Lawton*, 3 Atk. 13). When trading had resulted in the rise of a wealthy middle class, who were tenants but not owners of large houses, an exception was made in favour of domestic fixtures (*Grymes v. Boweren*, 6 Bing. 437). But so strongly had the landowning class left its mark upon the law, that

agricultural fixtures were never entitled to protection (*Elwes v. Mawe*, 3 East 38), until the farming classes became strong enough to have the law altered by statute (Agricultural Holdings Acts 1883 and 1900).

Several important decisions on the Conveyancing Act 1881 have been reported during the last three months. In *Fryer v. Ewart* (L. R. [1902], A. C. 187) the House of Lords, following the decision of the Court of Appeal in *Horsey Estate Limited v. Steiger* (L. R. [1899], 2 Q. B. 79), have held that a voluntary liquidation of a company for the purpose of reconstruction, though altogether unconnected with pecuniary difficulties, is an "act or proceeding in law having under any Act for the time being in force effects or results similar to those of bankruptcy," within sect. 2 (xv) of the Conveyancing Act 1881; and accordingly, if forfeiture of a lease is incurred thereby, no relief can be given under sect. 14. This seems unquestionably the effect of these sections of the Act, but it may be doubted if it was the intention of the Legislature.

Another important decision on the Conveyancing Act 1881 is that of Buckley, J., in *In re Scott, Scott v. Scott* (L. R. [1902], 1 Ch. 918). It was there held that where accumulations are made during the minority of a life tenant, the life tenant on coming of age is entitled to them. This is an extremely fair and sensible decision. To reach it, however, Buckley, J., had to read "property" in sect. 43 (2) as referring not to the corpus but the income of the settled estate, and "ultimately" as equivalent to "in the events which happen." If the Legislature really meant what his Lordship has held it did mean, then the need for so stretching the words used seems to leave the Act open to the charge "of an intolerable degree of looseness in the use of language," which is suggested in Hood and Challis's work, and which Buckley, J., professed his inability to understand.

Godwin v. Schweppes Limited (L. R. [1902], 1 Ch. 926) is chiefly important as showing that the unfortunate decision of the Court of Appeal in *Broomfield v. Williams* (L. R. [1897], 1 Ch. 602) is not to be taken as qualifying the principle laid down in *Birmingham, Dudley and District Banking Co. v. Ross* (L. R. [1888], 38 Ch. D. 295). In the last-mentioned case the court held that, on a grant of a piece of land with buildings on it, no right to access of light to the windows of such buildings passed under the grant, by virtue of sect. 6 of the Conveyancing Act 1881, if the surrounding circumstances showed that it was not contemplated by the parties that such a right should pass. In *Broomfield v. Williams* (*supra*) the Court of Appeal held that the fact that in the plan, in the margin of the conveyance, the adjoining land to that conveyed is marked building land, did not show that no right of light was intended to pass. This decision henceforth must be considered as limited to the particular facts of the case.

It is a pity that the Court of Appeal did not decide in *In re Handman and Wilcox's Contract* (L. R. [1902], 1 Ch. 599) whether a lease granted collusively by a life tenant, under the power of leasing given by the Settled Land Act 1882 at a rent below the best rent, is void or only voidable. Buckley, J., held that it was void. The Court of Appeal held that, even assuming it is only voidable, nevertheless the title which an innocent purchaser for value of such a lease obtains, is not such as the court would compel a purchaser from him to accept. The inclination of the Court of Appeal seemed to be in favour of holding such a lease voidable, and certainly the balance of convenience supports this view.

In *Grove v. Portal* (L. R. [1902], 1 Ch. 727) Joyce, J., held that a covenant in a lease of a fishery not to "underlet, assign, transfer, or set over, or otherwise, by any act or deed, procure the said premises" (not saying "or any part

thereof") "to be assigned, transferred, or set over unto any person or persons whatsoever" was not broken by the lessee granting by deed a licence to fish with one or more rods. He rested his judgment on the dictum of Lord Eldon in *Church v. Brown*, 15 Ves. 258, that a covenant not to part with the possession of the premises "would not have restrained the tenant from parting with part of the premises." This dictum dates from the age when the Court of Chancery's rules of interpretation were largely affected by the "leanings" of the court, and the court always "leaned" against forfeitures. Some of the dicta based on these leanings may yet have a bad time of it in the House of Lords. The other ground which was argued before his Lordship was as technical but more satisfactory—namely, that a licence was no part of the incorporeal hereditament created by the lease. A licence conveys no property in the thing over which it subsists; it merely makes that legal which would otherwise be illegal. In order to be a breach of the covenant not to underlet or assign the incorporeal hereditament, there must accordingly be an underlease or assignment of the "exclusive right" to fish—that being the point that distinguishes a profit à *prendre* from a mere licence (*Fitzgerald v. Firbank*, L. R. [1897], 2 Ch. 96).

The House of Lords have held, in an appeal from Scotland, that a trustee who purchases the trust property from his *cestui que trust* must disclose all information he possesses regarding the value of the trust property, whether he obtained it in his character of trustee or not (*Dougan v. Macpherson*, L. R. [1902], A. C. 197). This has always been the acknowledged rule in England, but it is doubtful whether it has been so thoroughly recognized and enforced by the Scottish Court. It is satisfactory, then, that the highest court has declared that the law in the two countries is the same.

J. A. S.

Many joint stock companies have seen an advantage in past years in inflating the nominal amount of their paid-up capital by dividing the existing stocks into others carrying dividend, contingent or fixed, differing from the conditions of interest on which the stocks were issued; and the effect has generally been to enlarge the market value of the capital so treated. To enable the shareholders to contribute to the national revenue some portion of this accession of wealth, the Stamp Act of 1891 enacted by section 113 that where companies, constituted otherwise than under the Limited Liability Acts, so dealt with their capital, they should forward to the Inland Revenue department a statement of the conversion, and that this document should be subject to a stamp duty equal to two shillings per cent. on the amount of increase.

In 1897 the Midland Railway Company obtained an Act to consolidate their stocks into others of greater nominal amount, and resisted the claim of the Inland Revenue on the ground that the conversion was merely a re-arrangement of capital for the purpose of distribution of dividend, and that what the Stamp Act contemplated was the creation of new stock by which a company's resources would be increased. But the House of Lords (Lords Macnaghten, Shand, Davey and Robertson), in *Midland Railway v. the Attorney-General* (L. R. [1902], A. C. 171; 86 L. T. [H. L.] 206), affirmed the decision previously given in favour of the Inland Revenue by the Court of Appeal (A. L. Smith, M.R., and Collins and Stirling, L.JJ.), which had itself affirmed the judgment to the same effect of the Divisional Court (Ridley and Darling, JJ.). Nine judges have therefore supported the decision.

Further interest is given to the case by a later one that has appeared in the news reports only, in which the defendants were *The Gas Light and Coke Company*, who,

under powers of their special Act of 1898, added to their nominal capital the considerable sum of £13,656,465, and on this sum the Company have been adjudged to be liable to stamp duty, notwithstanding that they had in their Act raised, as a barrier to the attentions of the Inland Revenue authorities, a proviso that "except to the extent of the increase in this section provided for, nothing in the Act shall be construed as authorising any increase in the nominal share capital of the Company." Ridley, J., pointed out that if the words of the clause had been clearly stated to the effect that "nothing in this Act shall render the Company liable to pay any duty within the Stamp Act 1891, s. 113," the clause would never have passed into law. A Parliamentary Committee, if it does not fully understand the purpose of a clause, ought, one would think, to demand from the promoters a clear declaration of its object.

Still further interest is added by the circumstances that the Finance Act 1899 (62 & 63 Vict., c. 9) raised the stamp duty from two shillings to five shillings per cent., and that a company successfully applied in the present session for power to make its nominal capital two and a-half times that of the amount paid up.

Dr. Johnson asserted that "there is nothing which has yet been contrived by man by which so much happiness is produced as by a good tavern," and Shenstone declared that he found his warmest welcome at an inn. But then the Common law requires that to secure these delights of right, the man must be a traveller. *Lamond v. Richard* (L. R. [1897], 1 Q. B. 541) ruled that when he starts all right as a traveller he may lose his status as such by prolonged stay at his inn; and now *Browne v. Brandt* (L. R. [1902], 1 K. B. 696; 112 L. T. 454; 37 L. J. 150) decides (Lord Alverstone, C.J., Darling and Channell, JJ.)

that, though his claim to be a traveller is as authentic as his claim on the poor law, he must not, to make sure of shelter from the rough night, be belated till all the bedrooms are occupied. The plaintiff was a *bonâ fide* traveller, for he was journeying on a motor-car which, after midnight, broke down, but though he was supplied with refreshment at an inn at which all the bedrooms were full, he was refused permission to pass the night in one of the public rooms. This case will probably, as far as it goes, stand as the leading case, one of the judges being of opinion that the old cases were no longer a guide, the habits of the people being changed; and he referred to the "Sentimental Journey" as an illustration. Most likely he had in mind the final chapter.

T. J. B.

SCOTCH CASES.

Section 33 of the Companies Act 1900 repeals section 25 of the Act of 1867 relating to the filing of a contract where shares are issued for a consideration other than cash, and it further provides that no proceedings under the repealed section shall be commenced after the date of the repeal. The obvious weakness is that the repeal is not retrospective, and that no provision is made for relief in the case of contracts between 1867 and 1900 which have been inadvertently omitted to be filed. Advantage has therefore occasionally to be taken of the Relief Act passed in 1898 (61 & 62 Vict., c. 25), as in the English case of *Brutton & Burney Limited* ([1901], 1 Ch. 637). The recent Scottish case of *Braid Hills Hotel Company Limited* (14th May, 1902, 39 Sc. L. Rep. 607) was peculiar, in respect that the contract had never been reduced to writing, and that its terms had to be gathered from a minute of meeting of directors and from affidavits. The First

Division, following an unreported Scottish precedent (*John Pollock and Another* (27th October, 1899), allowed the contract so ascertained to be filed.

The recent judgment of the Second Division, in *Bannatyne and others v. Lord Overtoun and others* (4th July—not yet reported), is of more general interest to the people of Scotland than any which has come before the courts for many years. It is well known that while Presbyterianism is the established form of religion in Scotland, all Presbyterians do not belong to the Established Church. The Secession Church was the result of the deposition of the Rev. Ebenezer Erskine and three others in 1733; the Relief Church owed its existence to the deposition of the Rev. Thomas Gillespie in 1752; and these bodies were ultimately united in 1847, under the title of the United Presbyterian Church of Scotland. In the meantime, in 1843, there occurred the famous disruption of the Established Church resulting in the formation of the Free Church of Scotland, so that until recently there were three large Presbyterian bodies in Scotland designated respectively the Established Church, the Free Church, and the United Presbyterian Church. The standards and constitution of all these churches were practically the same; the only difference related to the refusal of the dissenting bodies to submit to the control of the civil power in matters regarded as not belonging to the province of civil government. The Free Church at the date of its secession confined its objections to certain specified grievances, and declared generally that it adhered to the principle of an established religion under the conditions laid down in their claim, declaration and protest. On the other hand, the United Presbyterian Church adopted unconditionally the voluntary principle in religion. For many years negotiations have been proceeding for a union between the Free and United

Presbyterian Churches, and this union was ultimately accomplished in October, 1900, the united body being called the United Free Church of Scotland. The Synod or chief representative assembly of the United Presbyterian Church was unanimous for union, but in the General Assembly of the Free Church there was a minority of 27 as against a majority of 643. The present contention arises out of the action of this minority, which continues to call itself the Free Church of Scotland, and maintains that the majority having violated the constitution of the church, they (the minority) have a right to the whole church property, or at least to the property of such individual churches as by a majority of their own members adhere to the dissentients. In the Outer House Lord Low dismissed the action with expenses. The Second Division unanimously adhered on the merits; but instead of merely dismissing the action, they have assoilzied the defenders, and thus rendered it impossible for them to bring up the same question again in another form. The Lord Justice-Clerk, after a historical retrospect, negatived in detail each of the three reasons set forth by the pursuers as the foundation of their claim. These were (1) that State establishment was an "essential principle" of the Free Church; (2) that the Free Church had no power to modify or abandon that principle; and (3) that by union with the United Presbyterian Church the majority did abandon that principle. In common with Lord Trayner he placed considerable reliance upon what is known as the "Barrier Act," passed by the General Assembly of the Church of Scotland in 1697, long before any of the secessions referred to, and which Act had become part of the law of the Free Church by adoption. By that Act it was provided that, to prevent sudden alteration or innovation or other prejudice to the Church, in either "doctrine, or worship, or discipline, or government," the

General Assembly should not pass any Act "to be binding rules and constitutions to the Church" until after submission to the several presbyteries, but if after such submission the "general opinion of the Church agreed thereunto," the same might be passed. These forms having been strictly adhered to, their Lordships held that, even assuming the principle of establishment to have been at one time a distinctive doctrine of the Free Church, it was quite competent to the General Assembly to alter or abandon it.

R. B.

IRISH CASES.

The point decided in *Hogan v. Hogan* ([1901], 1 Ir. R. 168) is a comparatively small one, but as yet altogether uncovered by authority. Admittedly, a provision for a wife, declared by her marriage settlement to be made in discharge of all claims by her on the estate of the husband, will bar any right she might otherwise have under the Statute of Distributions in the event of the husband dying intestate. But the question here was: supposing that the husband dies not only intestate but childless, so that but for the provision in the settlement the Intestates' Estates Act 1890 would come into operation—how is the widow's right under that statute affected? *Hogan v. Hogan* answers shortly that this right also is barred by the provision in the settlement, even though such settlement were executed before the passing of the Intestates' Estates Act. The test, according to the judgment of Porter, M.R., is to be found in considering whether the right conferred by this statute was a completely *new* right—"a right new in kind"—or only an *extension* in particular cases of the old right, which a widow had under the Statute of Distributions. He took the latter view, basing it partly upon the language of section 4, which provides

that a widow's right to her first charge of £500 is "in addition to" and without prejudice to her previous rights.

Apparently the decision could also be supported by the necessity for a strict adherence to the terms of the settlement. The wife had thereby contracted, in consideration of a definite provision made for her, to give up "all claims" on the estate of her husband: and it is difficult to see why her right under the Intestates' Estates Act should not be considered a "claim," just as much as her right under the Statute of Distributions.

What is a Bank? This is not quite so difficult as the legal conundrum regarding the precise nature of a "place": and the Court of Appeal in Ireland, *In re Shields' Estate* ([1901], 1 L. R. 172), have answered it by virtually saying that a *gombeen* man (a country money-lender) may be a Bank if he is big enough. Shields carried on business as a money-lender in County Tyrone. In each of three towns in that county, he had two rooms in a house, where he attended one day each week. He lent money on promissory notes, usually payable in twelve weeks, with interest at a halfpenny in the pound per week; and he made advances on mortgage. He was also in the habit of receiving large sums on deposit, for which at one time he gave promissory notes; but since 1893 he had substituted for these notes deposit receipts, practically in the same form as those issued by ordinary banks in Ireland. His operations in these directions were very large, running up into many thousands; but his book-keeping was described by experts as "primitive." He never issued notes, cheque-books, or pass-books, and none of his customers kept current accounts. He himself had an account with the Bank of Ireland, from whom he received advances, and deposited title-deeds by way of security. In 1899, being embarrassed, he executed a trust-deed in favour of his creditors: and in subsequent proceedings to wind up

his estate, the question arose whether the Bank of Ireland were to be held secured creditors by virtue of the deposit of deeds, or to stand on the same footing as ordinary creditors. And the answer depended on whether Shields was a banker or not: for an Irish statute of the eighteenth century (33 Geo. II, c. 14, Ir.) provided that such mortgages or charges should, if made *by a banker*, be "levelled" in favour of his general creditors, unless the mortgage or charge in question had been registered.

The Court had therefore to address itself to the abstract question: what is the essence of banking? It was strongly pressed in argument that this consisted in what Counsel called "the banker's contract"—the obligation to honour a customer's cheques and the practice of doing so: and it was therefore said in effect that there could be no banking without a system of current accounts. Ross, J., held in favour of this view, but the Court of Appeal thought otherwise. The essence of banking, they said, is that a man should traffic with the money of others for the purpose of making profit. "If he keeps open shop," said Fitzgibbon, L.J., "for the receipt of money from all who choose to deposit it with him: if his business is to trade for profit in money deposited with him for that purpose, he answers the description of a banker."

The case is interesting in an academic way, but exactly similar facts could obviously occur but seldom. The practical question, as to where the money-lender ceases and the banker begins, is evidently left to be answered as a question of fact in each case. In *Exp. Coe* (3 De G., F. & J. 335), a dictum of Turner, L.J., certainly lent some colour to the contention that cheques and current accounts were necessary incidents of banking: "even that branch of the company's business which has most resemblance to banking differs materially from the ordinary business of bankers, for the company did not honour cheques payable

on demand and drawn upon themselves." The "current-account" test would certainly be a more convenient criterion than the comparatively vague test laid down by the Court of Appeal.

The curious, but not unnatural, anxiety of testators to evade the application of the rule against perpetuities to such non-charitable objects as the maintenance of graves and monuments, still continues to furnish new examples of ingenuity. *In re Tyler* ([1891], 3 Ch. 252) is perhaps the neatest and most effectual so far—a gift to the trustees of a charity, with a gift over to another charity in the event of their not complying with a condition in the will as to repair of a grave. But *Roche v. M'Dermott* ([1901], 1 Ir. R. 394) is also an illustration of an evasion of the rule, which has at all events been held valid, and may very probably prove effectual. The testatrix here made a bequest to the treasurer of the Society of St. Vincent de Paul at Limerick for the benefit of the poor of Limerick, *on condition* that the committee of that society should undertake in writing to her executors, to have the railing and ironwork of two vaults painted once in every three years. This was held a valid bequest, the Master of the Rolls saying as to the undertaking: "It may not be binding and might ultimately be repudiated. No action could be successfully maintained for its breach. But the condition is not the perpetual preservation of a grave, but the undertaking to preserve it; and there is nothing illegal in that."

The plaintiff in *Gilligan v. National Bank* ([1901], 2 Ir. R. 513) would at first sight appear to have been unfortunate in his recourse to the law. He deposited his title-deeds with the bank as an equitable mortgage to secure advances. While so deposited in the bank's cellar the deeds were seriously injured by a flood. Owing to their injured condition, the plaintiff was compelled to abandon a contem-

plated sale of the premises. He brought an action against the bank for damages for negligence. The jury found that there had been negligence; but the plaintiff had made the fatal mistake of not offering to redeem before commencing his action. It was held that until redemption he had no right of action; that even then, apparently, his right would arise only by way of compensation in the adjustment of accounts between himself and his mortgagee; and that in a mortgage there was no implied covenant on the part of the mortgagee to take reasonable care of title-deeds. In fact, the mortgagor had forgotten that it was not a case of the bailment of a chattel; the title-deeds were, as it was forcibly put by Madden, J., *the mortgagee's own*, during the continuance of the mortgage; they passed, not as a pledge, but as part of and a symbol of the realty. For their wanton destruction the mortgagee would indeed be liable as for waste: if he could not return them on redemption, then the case would come within the ordinary rule that a mortgagor redeeming is entitled to have back everything comprised in the mortgage security, and to compensation in default of this. It is this principle that explains the older cases (such as *Brown v. Sewell*, 11 Ha. 49), in which indemnity and compensation were decreed to a mortgagor for the loss of his deeds: they are not founded on any implied covenant, but upon the ordinary equitable jurisdiction to give relief in cases of accident.

The decision, at first sight striking but obviously correct, is supported by *The Bank of New South Wales v. O'Connor* (14 A. C. 273), in which Lord Macnaghten clearly emphasized the principle that it is contrary to equity to order a mortgagee to deliver up the title-deeds of property on any other terms than payment.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Law of Coal and other Minerals. By JOHN HENRY COCKBURN. London: Stevens & Sons. 1902.

Although there are recent editions of such well-known and well-established works on Mining, as *Bainbridge on Mines and Minerals*, and MacSwinney's *Law of Mines, Quarries and Minerals*, we must call the attention of our readers to this substantial volume. In the preface the Author states that "its preparation has occupied seven years," and it bears every mark of the most thorough and pains-taking labour. We believe all the cases in any way connected with the subjects treated will be found here, although it has not entered into the scope of the work to discuss at length conflicting decisions. We should think that the Author has succeeded in citing all the Statutes that can possibly apply, and his industry has even added some, such as the Public Libraries Act, which almost seem unnecessary. A good deal of collateral information has been introduced, particularly in the chapter treating of minerals as merchandise, where general information is given on such subjects as the law of Masters and Servants, Trade Unions, Principal and Agent, the Sale of Goods Act, Carriage by Railway and Canal, and Shipping; and under all these heads special attention is directed to the application of the general law to the particular circumstances of minerals. A chapter is devoted to the important subject of Rates, Taxes, and Duties; under which heads the export duty contained in the Finance Act 1901 is not forgotten. Such subjects as "Persons concerned with mines and mining," and "The various classes of lands on which mining may be carried on," are treated very thoroughly. We may also call attention to a short table containing a sort of judicial dictionary of the meaning of terms; but we think that a complete glossary of mining terms would have been a valuable addition. We dislike the form of the Table of Statutes, and prefer the ordinary practice of giving first the year of the reign, etc., and then the title of the statute. An important and very valuable feature of the work is the number of useful "practical hints" scattered through it. It is written throughout with a careful eye to the needs

of men of business as well as legal practitioners. On page 595 we have quite failed to see the point of the reference in note (f) to Archbold's *Criminal Pleading*.

Outlines of Criminal Law. By COURTNEY STANHOPE KENNY, LL.D. Cambridge: University Press. 1902.

Dr. Kenny has followed his *Select Cases in Criminal Law*, which we noticed in a former number, with the present work based on his lectures delivered at Cambridge. It is intended for the needs of young men preparing for examinations, and "older men when called upon to undertake without previous legal training the duties of a justice of the peace." The book is eminently a readable one, which may be attributed both to its breadth of grasp of principle, and to the judicious selection of the illustrations. We have been particularly struck by the manner in which such difficult but important subjects as *mens rea*, insanity, and intoxication, are treated, and the time spent in perusing the dissertations would not be thrown away even by many experienced criminal lawyers. The work is not, and does not pretend to be exhaustive, it modestly calls itself *outlines*, but a very wide range is covered, and there is not much left out which could be added without altering the scope of the work. There is an interesting historical explanation given for the privilege accorded to a wife by the presumption of conjugal subjection, which we do not remember having heard before. There are two or three small errors which should be noticed. The Clerk of the Central Criminal Court cannot correctly be called a Clerk of Assize, and it is not usual at the Norfolk Assizes to summon two hundred grand jurors. The arguments against the existence of the Grand Jury are perhaps not quite convincing.

Appeals from Justices of the Peace. By JOSHUA SCHOLEFIELD and GERARD R. HILL, M.A. London: Butterworth & Co. 1902.

A work dealing exclusively with the manner in which the decisions of Justices can be questioned is one which should prove very useful to practitioners. The practice is a difficult one, bristling with technicalities, and many points are by no means free from doubt. As an instance, we may give the much-debated point as to whether appeals from a distress for poor rates come under the provisions of the Summary Jurisdiction Act 1879, sect. 31. The

learned authors discuss this point carefully in more than one place, and come to the conclusion that, in spite of the decisions in *R. v. Lord Mayor of London* and *Fourth City Building Society v. East Ham*, such appeals do not come under the provisions of the Act. There is much to be said in favour of this contention, though it can hardly be said to be either the law, or the practice. The work seems to be very accurate, though in a few places we should suggest qualifications. For instance, on page 124 it is stated, "there can be no appeal under this section on grounds applicable to an appeal against the rate." We think this is better put as Mr. Ryde has it in his well-known book on Rating, "On appeal against a distress warrant the appellant cannot rely on *every* objection which he might have taken on appeal against the rate." There is a useful list in Appendix C of some Statutes containing a section taking away the right to a Certiorari. It would be an improvement if the index were somewhat fuller.

Poor Law Statutes. Vol. III. By JAMES BROOK LITTLE.
London: Butterworth & Co. 1902.

With this volume Mr. Little completes his work, and we must congratulate him on having produced one of the most useful books which a practising lawyer can desire. To produce a collection of the Statutes, and parts of Statutes, relating to the poor, and poor-law authorities and officers, requires not only great knowledge, but also great care, and great discretion in selecting the parts of a Statute which it is desirable to include, in cases where the whole of the Statute does not refer to the subject treated. Mr. Little, if he has erred at all, has erred in the direction of generosity to his reader. The present volume contains a large number of Statutes ranging from 40 & 41 Vict., c. 11, to 1 Edw. VII, c. 26. It also contains the Distress for Rates Act 1849 (12 & 13 Vict., c. 14), which was in error omitted from its proper place in Vol. II. The Acts contained are not for the most part so important as those contained in the earlier volumes, and they have not required so many notes, but some are of a high degree of importance, as for instance the Local Government Act 1894, which occupies about 80 pages. There is also in the present volume a general table of the Statutes, and of the cases contained in all three volumes, and also the General Index. This is very full and well-arranged, is separately paged, and takes up no less than 282 pages. We may mention that the volumes are

paged continuously all through, which is on the whole, we think, the most convenient plan, though it makes the figures sometimes rather bulky. It would perhaps have facilitated reference if the range of the Statutes contained in each volume had been marked on the outside.

British Rule and Jurisdiction beyond the Seas. By Sir HENRY JENKYNs, K.C.B. Oxford: Clarendon Press. 1902.

As Sir Courtenay Ilbert says in his interesting preface, "A pathetic interest attaches to this volume. It was to have been the first-fruits of its author's well-earned leisure. Its completion was arrested by his untimely death." The preface contains a short sketch and some appreciations of a valued public servant, for many years Parliamentary Counsel to the Treasury; and one whose name, from the nature of his work, was not very familiar to the public at large. "The record of his work is inscribed on the arid, anonymous, and ungrateful pages of the statute-book, and in the sixty and more folio volumes of confidential papers—drafts, notes, minutes, memoranda, and the like—which testify to his conscientious and unflagging industry." Among other measures which he drafted or helped to draft, are the Education Act, the Irish Church Act, Irish Land Act, Home Rule Bill, and the Finance Act. There is a note from his former chief, now Lord Thring, and extracts from letters of various public men, of which, perhaps, the most interesting is one from Mr. John Morley, who says of him, "The only man in my experience at all comparable to him in the difficult art of rapidly devising the right words for the bare rudiment and intention of a clause or an amendment was Herschell, and Jenkyns was at least as clever in turning a sharp corner."

The present work was not completed by Sir Henry Jenkyns, but has been revised by Sir Courtenay Ilbert and Mr. Graham-Harrison, and a very important chapter, namely, that on Self-Governing Colonies, has been re-written by Mr. J. A. Simon, "although it is partly based on materials supplied by Sir Henry Jenkyns." The result is a work of great interest and value, and containing an amount of information which is, so far as we know, to be found in no other one book. Its appearance is particularly opportune just now, when colonial questions and relations are so much to the fore. We may especially call attention to the information about, and discussion of, the conditions, rights, and liabilities connected with protectorates, which is very important, and to the full treatment

which has been given to the subject of Consular Jurisdiction, supplemented as this last has been by the valuable memorandum by the late Mr. Scott Hope which forms Appendix VI. There are always difficulties in indexing a very compact work, but this index seems to us rather scanty, and there are a few subjects which we think might have been treated more fully; such as our position in Cyprus and Egypt, and also our relations to the late Transvaal Republic. We should also have liked more information as to the constitutional relations with the Channel Islands. The treatment of "appeal to the King in Council" is treated so shortly as to be almost misleading, and for the use of lawyers, tables of cases and Statutes might have been provided.

Conditions of Sale of Real Property. By FREDERICK E. FARRER. London: Stevens & Sons. 1902.

This is a very useful book to those who have to deal with sales of real property. It consists of several short introductory chapters, dealing with such questions as the auctioneer's position, sales under powers of sale, unilateral mistake, &c. Then follow a large number of carefully drawn conditions with full notes to each. The notes are very good and the law has been carefully considered, and in some instances dissent from decided cases is expressed. The work is suitable both for students and practitioners.

Chitty's Statutes. Vol. XIV. By J. M. LELY. London: Sweet & Maxwell. 1902.

We have from time to time noticed Mr. Lely's annual publication of the Statutes of Practical Utility, and now we are glad to welcome the appearance of a consolidation of these issues for the last seven years, namely, from 1895—1901 inclusive. The present issue is superior to the annual volumes from which it is formed, both in being contained in only one volume and also in having in many cases additional notes, as for instance, on the Criminal Evidence Act 1898 and the Vaccination Act 1898. We believe all the reported cases that have been decided on the Statutes included are given, with one notable exception. Not even Mr. Lely's courage and industry were equal to following his usual course with regard to the Workmen's Compensation Act 1897, so he has contented himself with giving the most important cases, and a reference to a long list of

works dealing specially with the subject. The preface, besides giving an outline of the contents, comments on the desirability of consolidating the Poor Law Acts, the Death Duties Acts, and the Solicitors Acts; and he also calls attention to some curious anomalies still existing in spite of the revisions of our Statutes. The book is one of the highest value. In default of having found any more serious error, we must point out that in reference to *R. v. Badger* the page is wrongly given as 46 instead of 468. We do not see why there should not have been a table of cases, and Mr. Lely has not yet adopted the excellent custom of giving the dates of all the cases cited.

Questions and Answers from the Justice of the Peace. Edited by C. E. ALLAN, M.A., LL.B. London: Office of the "Justice of the Peace." 1902.

This very substantial volume contains over 8,000 answers or opinions taken from the volumes XLI to LX of the *Justice of the Peace*. This covers the twenty years from 1877—1896 inclusive. These answers have, when necessary, been revised and modified in the light of subsequent cases or decisions. The names of the Editor and his assistants are a guarantee of the care and knowledge that have been bestowed on the task. An immense variety of interesting and many difficult points are considered, and, though possibly we may not always agree with the answers, there can be but one opinion of the value of such a collection to all concerned with the practice of Courts of Summary Jurisdiction.

Encyclopædia of Forms and Precedents. Edited by ARTHUR UNDERHILL, M.A., LL.D., assisted by CHARLES OTTO BLAGDEN, M.A., and WILLIAM E. C. BAYNES, LL.B. Vol. I. Abstracts of Title—Appointments. London: Butterworth & Co. 1902.

We have here the first volume of an ambitious work, being no less than an attempt to make "a complete collection of all precedents—other than court forms—useful to the legal practitioner." Of the advantages of such a collection there cannot be two opinions. We all know how difficult it often is to find a particular precedent, other than a conveyancing one, and the number of books that may be ransacked before it is found, if at all. Mr. Underhill, in an amusing preface, states the principle on which the work is founded to be

"that it shall be thoroughly practical, modern, concise, and lucid." He goes on to defend the paragraphic form in precedents, and also to defend "the daring interpolation of the word 'is' between 'This Indenture' and 'made' at the beginning of deeds containing recitals." It is stated at the commencement of each heading who is responsible for it, then follows a preliminary note, and then the precedents, with foot-notes. Particular attention has been paid to the important subject of stamps. We might particularly call attention to the very instructive abstract of title drafted in a faulty way, with the requisitions thereon, the precedents of accounts, agency documents, allotments, small holdings, &c. Other important headings are annuities and rent-charges, and appointments under powers. An unusual precedent is an agreement for adoption, and, as the Editor points out, the agreement is void as against the parents. We shall look forward with interest to the next volumes of this promising undertaking.

Jurisprudence. By JOHN W. SALMOND, M.A., LL.B. London : Stevens & Haynes. 1902.

The style of this very satisfactory work is clear and pleasant, and the learning shown is wide and accurate. The Jurisprudence of which Mr. Salmond treats is theoretical jurisprudence, or as he defines it, "*the science of the first principles of the civil law.*" There are a great many discussions and definitions which we should like to call attention to, in which principles are expressed with admirable clearness, such as the discussion on "law and fact," the description and analysis of the sources of law, and the dissertation on custom. We should particularly wish to direct our readers' attention to the thoroughly sensible and virile manner in which the question of punishment is treated, particularly the part dealing with the element of retribution in punishment. This is a point which is very apt to be disregarded by modern sentimentalists. We quite agree with the author when he says, "A morbid sentimentality has made of the criminal an object of sympathetic interest rather than of healthy indignation; and Cain occupies in our regards a place that is better deserved by Abel." We might also direct attention to the treatment of such subjects as *mens rea*, malice, negligence, and much else, but space will not permit. The book is written primarily for the use of students; but it should be found both interesting and instructive by

those lawyers who are no longer students in the scholastic sense of the word, and by many laymen. We are not sure whether the suggestion that the law of evidence might be made more elastic and more under the discretion of the judge is quite practicable, but it is worth considering. The arrangement is rather unusual, but convenient, particularly for students. At the end of each chapter comes an analytical summary, and after that references to the authorities on the subject, and there is also an appendix on the literature of jurisprudence.

English Law and the Renaissance. By FREDERICK WILLIAM MAITLAND, LL.D., D.C.L. Cambridge: University Press. 1901.

This is the Rede Lecture for 1901, and is mainly concerned with describing the danger that the English law once ran of being supplanted by the Roman Civil law by means of a *Reception* like the one in Germany. From this we were saved by the law schools of the Inns of Court. The story is narrated with Professor Maitland's usual ease of style, and enriched with numerous notes full of erudition.

The English Reports. Volumes XVII—XX. Privy Council. London: Stevens & Sons. Edinburgh: Wm. Green & Sons. 1902.

These volumes complete the re-issue of the Privy Council Cases, and contain the reports in Moore, N. S. 7—9, and in Moore's Indian Appeals, 1—14. The last three volumes consist exclusively of Indian cases, and though many of them are of great importance, they are not likely to be read or referred to by many English lawyers. Volume XVII contains a number of interesting cases, which may be divided into three branches—Shipping cases, Ecclesiastical cases, and International law cases. The former include the *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, on the question of seaworthiness, and *The Teutonia*, on the duties of the master of a ship in time of war. The most important of the ecclesiastical cases are *Voysey v. Noble* and *Hebbert v. Purchas*. The International law cases include *The Gauntlet*, which raised a question under the Foreign Enlistment Act, and *The Telegrafo*, which decided that the taint of piracy does not, in the absence of conviction or condemnation, continue like a maritime lien, to travel with the ship through her transfers to various owners. It may be noticed that this was an appeal from the Vice-Admiralty Court of the Virgin Islands, Tortola. There is an interesting Constitutional case, *Victoria Legislative*

Assembly (Speaker of) v. Glass, concerning the power of the Victoria Legislative Assembly to commit by a general warrant for contempt. There is also the case of *Laughton v. Sodor and Man (Bishop of)*, where it was held that the charge of a bishop to his clergy in Convocation was a privileged communication. A curious but sensible point of Canadian law is brought out in *Wardle v. Bethune*, where it was held that architect and builder are jointly and severally responsible if a building perish within ten years, from a defect in construction, or even from the unfavourable nature of the ground.

The Free Churchman's Legal Handbook. By EDMUND C. RAWLINGS. London: National Council of the Evangelical Free Churches. 1902.

This legal handbook is published mainly for the benefit of Free Church Ministers, and is intended to give them legal information as to their rights, liabilities, etc. It naturally begins with the registration of Places of Worship, and their liability for rates, taxes, etc. The next four chapters deal with subjects which concern Ministers specially, *i.e.*, the law concerning Marriage, Burials, Charities, and the status, privileges, and liabilities of Ministers themselves. In each case the information, though short, is clear and practical. The rest of the book treats of subjects which are of importance to every citizen, such as Sunday observance, Gaming and Betting, Poor Law and Education, but which do not seem to us more important to Free Churchmen than to the members of any other Church. We should not suppose either that the law of slander and libel concerns them more than others. There is an appendix of Statutes relating to Sunday observances.

Commercial Trusts. By JOHN R. DOS PASSOS. G. P. Putnam's Sons: New York and London. 1901.

This little volume, which is one of a series entitled "Questions of the Day," contains an argument delivered before the Industrial Commission at Washington in December 1899. It is an argument in favour of trusts, or perhaps more correctly, in support of the "rights of aggregated capital." After explaining the nature of trusts and their development from simple partnerships, it proceeds to deprecate hasty legislation, on the grounds: that the present development of American commerce has rendered them indispensable: that no evidence has been given that they are injurious to

the public welfare: that the existing law is sufficient to deal with any combinations that may be injurious: that it is practically impossible to suppress them by law: and that any federal legislation to stifle trusts would be unconstitutional, as opposed to "States Rights." The argument is not sufficiently expanded to be thoroughly convincing, and is more in the style of an address to a jury than that of an elaborate legal or economical discussion, but it puts forward strongly, and clearly, many of the difficulties inherent in legislation on this subject, and is well worth reading by those interested in the question.

A Treatise on International Public Law. By HARRIS TAYLOR, LL.D. London: Sweet & Maxwell. 1902.

So many questions of International law have recently arisen and been discussed in consequence of the Hague Peace Conference and the South African War, that a new treatise on the subject is welcome. Mr. Taylor has produced a learned and well-balanced work, and though, as is perhaps natural from his nationality, he deals most fully with questions in which the United States have been concerned, and attaches almost too much weight to the official statements and despatches of United States public officials, yet he is always moderate and fair in his opinions. The point of view from which he regards International law is mainly what may be called the *historical*, and the following is the definition he gives of that much criticised term. "International law may be defined to be the aggregate of rules regulating the intercourse of States which have been gradually evolved out of the moral and intellectual convictions of the civilized world, as the necessity for their existence has been demonstrated by experience." It will, no doubt, interest our readers to see on what grounds the latest American publicists support the Monroe Doctrine. This the President of the United States had to declare was a principle which had "peculiar if not exclusive relation to the United States," and that "if the balance of power is justly a cause for jealous anxiety among the governments of the Old World, and a subject for our absolute non-interference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government." To put it shortly, it is a right of general control in the affairs of the New World, which the United States claims on the ground that it is the most powerful State there. This may become a part of International law when it has been recognised by all other

nations, but the justice of the principle can hardly be said to be obvious when applied to a boundary dispute between England and Venezuela. We might also call the reader's attention to the defence of the intervention in Cuba. It will be noted that Mr. Taylor condemns the extension which the doctrine of "continuous voyages" received from the United States Courts during the American Civil War. It is curious to compare this extension with the protests of the American statesmen and jurists against the original doctrine of continuous voyages when put forward by Great Britain. There are some interesting references to the American Navy, as for instance the rule forbidding the bombardment of unfortified towns for non-payment of ransom. There are some subjects which are rather too shortly treated, as for instance, protectorates, where no reference is made to the protected Indian States, nor to Tunis. The remarks on the modern development of "spheres of influence" are full of interest.

Dangerous Trades. Edited by THOMAS OLIVER, M.A., M.D., F.R.C.P. London: John Murray. 1902.

This is a book of great interest to all who are "interested in the hygienic side of industrial problems and in occupation diseases," and also in the many social, political, and legal questions connected with such problems. Its scope is well described on the title-page as "the historical, social, and legal aspects of industrial occupations as affecting health, by a number of experts." There is a large number of essays on the diseases induced by specific "dangerous trades," many of them with somewhat gruesome illustrations, which we have neither the space nor knowledge to comment on, but the most interesting articles to lawyers will probably be the general introduction by Dr. Oliver; the historical sketch of the legislation for dangerous trades by Miss Anderson; another article by the same lady—who is H. M. Principal Lady Inspector of Factories—on the regulation of dangerous trades in some of the chief European countries; and the principles of prospective legislation for dangerous trades, by Mr. H. J. Tennant, M.P. In the first Dr. Oliver carefully considers the arguments for and against including dangerous trades within the scope of the Workmen's Compensation Act. He recognises the difficulty of defining what is meant by "industrial disease," and considers that "it would have to be placed upon the same narrow limit as an accident. It would require to be shown

that it was the sole result of the occupation, and that there had been produced a definite pathological lesion of the body." Among other practical suggestions he considers that "the Factory Department ought to form a separate and distinct branch of the Home Office to be directed by a Secretary or Under-Secretary of State." Miss Anderson's sketch of the history of legislation is interesting, but does not include the Act of 1901, though she refers to the Bill "passing to report stage." Mr. Tennant, after pointing out what reforms he considers the most pressing, discusses in a note the attempt made by the Act of 1901 to deal with them, and does not consider it entirely satisfactory. We must conclude by recommending such of our readers as are interested in this subject to read at any rate the three articles we have referred to. They are not long, and give much food for thought.

The Critic Black Book. Appendix to Vol. I. Edited by HENRY HESS. London: British and Colonial Publications Co. 1901-2.

This is a supplementary volume to the work noticed in our May number, and consists of five appendices and an index. The appendices deal mainly with the history of various companies directed by some of the directors mentioned in the earlier volume. The index contains an alphabetical list of the names of a large number of companies referred to before under the names of the directors connected therewith. There is also an appendix containing tables of the companies floated by three prominent company promoters. It is likely to prove a useful adjunct to the volume before published.

Fourth Edition. *The Law relating to Building Societies.* By EDWARD ALBERT WURTZBURG. London: Stevens & Sons. 1902.

Though hardly any Statutes have been passed which affect Building Societies since the issue of the last edition of this work in 1895, there have been a number of cases which require to be noted up, and which quite justify the issue of this new edition. Mr. Wurtzburg's book is well-known, and the present issue is likely to meet with the same favour as those previously issued. The additions to it, besides the cases we have referred to, principally consist of the forms of Annual Account, and Statement for the use of Incorporated and Unincorporated Societies respectively. The table of Statutes referred to in the work is included in the index,

which is unusual. We note that the heading in the index "Felony, compounding" is incorrect, as in the case referred to, namely, that of *Jones v. Merionethshire Permanent Building Society*, the offence alluded to was not a felony but a misdemeanour, and the transaction is better described in the side note as "Agreement to stifle a prosecution," under which heading it also occurs in the index.

Fifth Edition. *Smith's Law of Master and Servant.* By ERNEST MANLEY SMITH. London: Sweet & Maxwell. 1902.

The Preface contains the unusual but welcome announcement, that the text of the present edition occupies considerably less space than that of the last one, which was published so long ago as 1885. However, there has been a considerable addition to the Statutes, as since then such long and important Acts have been passed, among others, as the Coal Mines Regulation Act 1887, the Workmen's Compensation Act 1897, and the Factory and Workshop Act 1901; all of which find a place in the Appendix which consists of nearly 300 pages. As a result, we find there is a reduction in the text of about 70 pages, and an increase in the Appendix of about 90, and all references to cases under the Workmen's Compensation Act 1897 are confined to the notes to that Act. The reductions have been effected mainly in places where some new statute has enabled the author to condense the law and omit cases, as for instance, in relation to partners by the help of the Partnership Act 1890, and as to servant's wages on bankruptcy of master by the Preferential Payments in Bankruptcy Act 1888. Among additions we notice that the question of servants receiving commissions and secret profits, and the important subject of actionable conspiracies, are discussed. The work contains a very large amount of information on all the various aspects of the law of Master and Servant, and we think it may be consulted with every confidence in its accuracy. The index, however, could be improved by being made more exhaustive.

Sixth Edition. *Lindley on Companies.* By the Honourable WALTER B. LINDLEY. London: Sweet & Maxwell. 1902.

It is quite time there was a new edition of *Lindley on Companies*, as there has not been one for thirteen years, during which period very important Acts have been passed. These include the Directors Liability Act 1890, and the Companies Acts of 1898 and 1900; besides which new sets of rules have been issued, and a long series

of important decisions given from *Derry v. Peek* to the *Lagunas Nitrate Co. v. Lagunas Syndicate*. The result of all this new material has necessitated many alterations, and much re-writing and additions; and the result is two substantial volumes of something like a thousand pages each, of which the table of cases takes up about 160 pages, and the indexes—for there is both a general index and a separate index to the Acts and Rules—nearly 300 pages. As regards the cases cited, there is an unusual note saying that “no attempt has been made to collect cases decided since the establishment of the Law Reports and not reported therein.” We cannot help thinking that this is a mistake, as the result must inevitably be to omit some cases of importance. The editor has exercised a wise discretion in still including, in many instances, cases decided on repealed sections; they are often of the greatest value in interpreting more modern statutes. Cases which relate to companies formed under the old law are also retained, though questions connected with such companies seldom arise. As might be expected, the discussions on the Companies Act 1900 constitute an important part of this new edition, and Mr. Lindley does not blink the difficulties which arise in the interpretation of some parts of the Act, particularly as regards that part which regulates the formation of companies. We should like to call attention to the manner in which the important and difficult question of the effect of non-compliance with sect. 10 of the Act is treated. The curious point raised by Mr. Pulbrook, in his valuable little book on Joint Stock Companies, as to the possible liability of newspapers for publishing incorrect statements as to prospectuses, is not touched on. A very important new chapter is the one dealing with Debentures and Debenture Stock; this has become such an important subject since the issue of the last edition, that a special section is devoted to it in the present one. The treatment throughout of the various parts of this big subject of Companies is very full and careful; though now and then we are tantalized by having the argument for and against a doubtful question carefully stated, but no opinion given as to which is correct. The appendices contain the texts of some important statutes, rules, and some valuable notes on Foreign Companies, Benefit and Building Societies, &c. The index is a very good one. We may add that in this edition the editor has had the inestimable advantage of the assistance and revision of the author, Lord Lindley.

Tenth Edition. *Wharton's Law Lexicon.* By J. M. LELY, M.A. London : Stevens & Sons. 1902.

Ten years is a long interval in these times for a standard law book to remain without a new edition, and we are glad to see that another edition of this well-known publication has been issued under the competent editorship of Mr. Lely. A good deal has been added and something taken away ; the maxims seem to be losing their authority, and in the opinion of the learned editor to have rather outlived their utility. Wharton contains a vast amount of both curious and useful information. Many of the headings are short essays in which the information is condensed with Mr. Lely's accustomed skill. Perhaps a few more definitions might be added, such as one of that curious person "the hypothetical tenant," and a more complete discussion of that difficult word "ministerially." The information, usually so exact, is not quite correct on Circuit subjects. Surrey has, and has had for a long time, a Circuit town of its own. A fuller description of the duties of the Clerk of Assize would be desirable, and the fact that there are Associates on Circuit is ignored. The "Spinning House" at Cambridge has been abolished in consequence of the passing of 57 & 58 Vict., c. 6 (Local Act). We hardly think the definition of "conspiracy" is sufficient, though it is by no means easy to give an adequate one.

CONTEMPORARY FOREIGN LITERATURE.

La Esecuzione delle Sentenze Straniere in Materia Civile. By ENRICO LA LOGGIA. Turin, 1902.

This is a commentary on the varying rules of different nations as to the execution of foreign judgments. The learned author distinguishes three main currents of opinion, each having varieties. The first is that which, in Merlin's words, holds that the authority of a foreign judgment is derived not from the *jus gentium* but from the municipal law, and so cannot communicate its effect beyond the boundaries of the nation whose tribunal pronounced it. Sweden appears to be the main instance of this somewhat antique rule. The second is the recognition of ultra-territoriality for reasons of comity. England and the United States are the principal examples. The third requires reciprocity. To this class belong a large number of

European legal systems, especially Germany and Austria. English and United States law fills about twelve pages, and is mostly cited with accuracy. Several of the more important text-books and decisions are included; but, as might be expected in the work of a foreign jurist, some of the references to reports are very difficult to identify.

Captazione. By MARIO SARFATTI. Milan, 1902.

This, like the small volume on *Caparra* by the same writer, noticed in the February number of the *Law Magazine and Review*, is an extract from the *Enciclopedia Giuridica Italiana*. The title, it may be stated, means what we call "undue influence," the *captatio* of Roman law. Signor Sarfatti's work is a very complete and concise statement of the Roman and Italian law on the subject, with occasional references to other systems, including the English. Among other authorities, Mr. Stroud's article, "What is Malice?" in the *Law Magazine and Review*, May, 1899, is cited. The Italian Encyclopædia of Law, if one may judge by these specimens, is a work of much learning and research.

PERIODICALS.

Journal du Droit International Privé. Nos. III, IV. Paris, 1902.

There is a curious and interesting article on marriage and divorce in their international relations from the Russian point of view. It appears that Russia will not recognise the civil marriage abroad of a Russian subject. The difficulties and occasional injustice arising from this state of things have led to much correspondence between the Procurator of the Holy Synod, the Minister of Foreign Affairs, and other authorities, but no conclusion appears to have resulted. It is interesting to note (p. 388), that Belgium allows an action to be brought on a contract of *courtage matrimonial*, or marriage brokerage contract, which England has always refused to admit.

Deutsche Juristen-Zeitung. April 1—June 15. 1902. Berlin.

Herr Schultzenstein contributes an article of an original kind on the position taken by Victor Hugo towards the criminal law,

especially in the character of Jean Valjean (p. 168). It will be found well worth reading. In an article entitled "Reputed Ownership im deutschen Recht," one finds what is very rare, the adoption in German of an English juristic term. It is hardly necessary to say that the Civil Code itself does not use the English term. Many recent cases are discussed, especially one regarding the Prometheus Insurance Company of Berlin. But few of them contain points of interest to English readers.

La Giustizia Penale. 10th March—9th June, 1902. Rome.

This periodical continues to maintain its high standard. It is refreshing to meet with an Italian legal work which chiefly confines itself to concrete cases, and is not overladen with psychological and metaphysical studies, as is so often what one is led to expect in Italian criminal law. As a study in comparative law *La Giustizia Penale* is always instructive. Take, for instance, a case at p. 365, in which the charge was *vilipendio delle istituzioni costituzionali*. Were this an offence in England, the existing prisons would be found quite insufficient.

JAMES WILLIAMS.

Other publications received:—*Report on the Hamburg Conference, Part III* (International Maritime Committee); *Facts about Flogging* (Humanitarian League); *Cornell University Announcement*; *New York State Library Bulletins*, 69-72; *Civil Judicial Statistics, Part II*; *Randolph's Suits between States*; *Neave's Law relating to Personal Injuries* (Effingham Wilson); *De Montmorency's State Intervention in English Education* (Cambridge University Press).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Public Opinion*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Accountants' Journal*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Virginia Law Register*, *American Lawyer*, *Albany Law Journal*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Queensland Law Journal*, *Law Students' Journal*, *Westminster Review*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*, *Yale Law Journal*, *New Jersey Law Journal*, *Columbia Law Review*, *Japan Register*.

